IN THE

Supreme Court of the United States

October Term, 1979

No. 79-521

CONSUMER PRODUCT SAFETY COMMISSION, *et al.*,
Petitioners,

v.

GTE SYLVANIA, INCORPORATED, RCA CORPORATION, THE MAGNAVOX COMPANY, ZENITH RADIO CORPORATION, MOTOROLA, INC., WARWICK ELECTRONICS, INC., FORD AEROSPACE & COMMUNICATIONS CORPORATION, MATSUSHITA ELECTRIC CORPORATION OF AMERICA, SHARP ELECTRONICS CORPORATION, TOSHIBA-AMERICA, INC., GENERAL ELECTRIC COMPANY, and ADMIRAL CORPORATION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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TABLE OF CONTENTS

TABLE OF CONTENTS (Continued)

TABLE OF CONTENTS (Continued)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (Continued)

TABLE OF AUTHORITIES (Continued)

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GTE SYLVANIA, INCORPORATED, *et al.*,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENTS

QUESTION PRESENTED

Did the Court of Appeals correctly affirm entry of an injunction restraining the Consumer Product Safety Commission from publicly disclosing information furnished to it by respondent manufacturers in confidence in response to its own information demands, when the identity of the manufacturers "may be readily ascertained" and the CPSC admittedly failed to "take reasonable steps to assure" that the information was "accurate" and that disclosure would be "fair in the circumstances and reasonably related to effectuating the purposes of [the Consumer Product Safety Act]" as required by Section 6(b)(1) of the Act?

STATUTE INVOLVED

Section 6(b)(1) of the Consumer Product Safety Act, 15 U. S. C. § 2055(b)(1), provides in relevant part:

> "The Commission shall take reasonable steps to assure, prior to its public disclosure thereof, that information from which the identity of [a] manufacturer or private labeler may be readily ascertained is accurate, and that such disclosure is fair in the circumstances and reasonably related to effectuating the purposes of [the Act]."

STATEMENT

This case involves the decision of the Consumer Product Safety Commission ("CPSC") to disclose to the public certain admittedly inaccurate, unverified, and misleading information identifying specific manufacturers (the respondents here) that had been submitted by the manufacturers under claims of confidentiality in order to comply with special orders and subpoenas issued by the CPSC. The question presented is whether the public disclosure by the CPSC of the information in response to requests under the Freedom of Information Act ("FOIA"), 5 U. S. C. § 552, should be permitted when Section 6(b)(1) of the Consumer Product Safety Act ("CPSA"), 15 U. S. C. § 2055(b)(1), concededly would preclude any public disclosure of the same information if "initiated" by the CPSC.

The Gathering of the Information

In early 1974, the CPSC began to investigate possible hazards associated with television receivers and to consider whether there was a need for developing safety

standards. 39 Fed. Reg. 10,929 (1974).[1] The public notice initiating the investigation requested television manufacturers to submit to the CPSC all "TV-related accident" reports collected by them since hearings held in 1969 by the National Commission on Product Safety. *Id.* at 10,930.

After reviewing the materials voluntarily submitted in response to the public notice, the CPSC decided to use compulsory procedures to obtain additional information. On May 13, 1974, the CPSC directed special orders to twenty-five television manufacturers, and on July 26, 1974 issued subpoenas to sixteen manufacturers (including the twelve respondents), calling for the submission of the same information as had been requested in the public notice and some additional information as well (A. 94-95, 96-97; *see, e.g.*, A. 36-37, 41-43).[2]

The manufacturers' responsive submissions were accompanied by claims that the "TV-related accident" information was proprietary and not ordinarily disclosed to anyone and that it should be given confidential treatment by the CPSC (A. 96, 98; *see, e.g.*, A. 55-63). The manufacturers also stated that any disclosure of the information identifying particular manufacturers would be grossly misleading because "accident" figures are meaningful only when considered in light of the number of each manufacturer's sets in use and the varying incident reporting systems used by the manufacturers in preparing their submissions (*see, e.g.*, A. 181, 183).

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1. Five years later, after a thorough review of the safety of television receivers, the CPSC found that no standards were necessary and terminated its investigation. 44 Fed. Reg. 44,206 (1979).

2. "A." refers to the Appendix to the Briefs in this Court and "Pet. App." to the Appendix to the Petition for Certiorari.

From the outset, compliance with the CPSC's information requests was impeded by the agency's repeated refusal to define the term "TV-related accident" (*see, e.g.*, A. 102-03, 227, 228), a term for which there has never been any generally accepted industry definition (A. 97 n. 19, 205 ¶ 3). However, despite warnings that the vagueness of its requests inevitably would result in confusion (*see, e.g.*, A. 181, 300), the CPSC made no attempt to clarify them.

As was predicted, the failure of the CPSC to define "TV-related accident" resulted in greatly varying submissions, with some manufacturers applying much more restrictive definitions to the term than others (A. 221, 238).[3] For example, some manufacturers supplied data concerning alleged "fire" or "smoke" incidents only, whereas others also submitted reports of alleged incidents involving implosion (collapse of the television picture tube), shock, excessively high voltage, mechanical failure, and the like (A. 103, 184 ¶ 14, 214 ¶ 4, 221, 248). Some manufacturers furnished data only for alleged incidents involving personal injury or damage to property external to the television set, whereas others submitted reports for alleged incidents involving damage whether or not it extended beyond the sets themselves (*see, e.g.*, A. 206 ¶ 6, 209 ¶ 12, 214 ¶ 4). Finally, some manufacturers limited

3. Even after reviewing the manufacturers' submissions, the CPSC did not attempt to make them more comparable by reaching some reasonable definition of the term "TV-related accident" and discarding the reported incidents that did not come within that definition. Instead, the CPSC included in its view of what constituted a "TV-related accident" such far-fetched occurrences as a fire caused by a burning candle sitting on top of a television set (A. 254), a hernia sustained while carrying a television set (A. 231), and the situation where a television watcher's cigarette fell in the cushioning of a chair and started a fire that spread and caused the television to catch on fire (A. 253).

their submissions to data on alleged incidents involving television sets manufactured after 1969, whereas others reported on alleged incidents that came to their attention within the relevant period without regard to the date of manufacture of the set (*see, e.g.*, A. 185 ¶ 16, 206 ¶ 6, 214 ¶ 4).[4]

The CPSC recognized that there were differences in the various manufacturers' record-gathering and retention systems and also that some submissions were "inadequate" or "marginal" (A. 217). However, it made no attempt to secure more uniform compliance with its subpoenas because it saw no need for better information; in its view "sufficient information [had] been collectively submitted by the sixteen manufacturers to significantly facilitate the Commission's regulatory development activities for TV receivers" (A. 217).

Compounding the unreliability of the submitted information as a whole and the impossibility of drawing meaningful comparisons among the manufacturers was the fact that the CPSC required submission of all reports of "TV-related accidents" without regard to whether the reports were verified or not. Indeed, the sample data forms accompanying the subpoenas explicitly acknowledged that "in many cases" the data would be "incomplete, unverified and even incorrect" (A. 98; *see, e.g.*, A. 45). Accordingly, many of the reports submitted emanated from second and third hand sources whose reliability was completely untested (A. 255; *see, e.g.*, A. 184 ¶ 13, 207

4. The differences in the definitions used by the manufacturers had a significant effect on the number of incidents reported. For example, had one of the respondent manufacturers reported only incidents involving sets manufactured since 1969, it would have reported only 10% of the incidents it actually did report (A. 185 ¶ 16).

¶ 7). Nevertheless, the CPSC took no steps to determine whether any of the alleged "TV-related accidents" referred to in the submissions were in reality caused by the television sets involved, or, indeed, whether the "accidents" had actually occurred at all (A. 277, 292, 296), other than to investigate perhaps as few as ten and in any event no more than 100 of the 7,620 reported incidents (A. 236).

After reviewing the submissions, the CPSC had the information computerized and prepared a printout listing for each manufacturer and cataloging by type the alleged incidents that it had reported (A. 98, 244-46).[5] The resulting printout is titled "TV Accident Reports" (A. 249) and does not indicate that something other than a television set may have been the cause of any of the listed "accidents" (A. 254, 267). Nor does it indicate that some (indeed, most) of the reports from which the printout was compiled have never been verified (A. 247, 249, 254-55, 287). The printout thus not only is characterized by the same defects as the underlying data but also adds to the problem by "creat[ing] an impression of accuracy" (A. 120 n. 87).

The many defects in the submitted "TV-related accident" information led both the CPSC's consultant and its project director to conclude that comparisons among the manufacturers on the basis of the information would not be proper and that disclosure of the information would not aid the public in making safety comparisons or serve any other useful purpose (A. 152, 240-41, 256-57, 268, 288).

5. One of the purposes of creating the printout was the "thought that it might be made available to freedom of information requesters" (A. 226; *see* A. 217-18, 152-54).

The CPSC's Decision To Disclose the Information

On June 14, 1974, Consumers Union of the United States, Inc. and Public Citizens' Health Research Group ("the requesters") submitted formal FOIA requests for the information that had been supplied in response to the CPSC's special orders (A. 136-37, 138-40).[6] The manufacturers, who were informed of the requests by letters dated August 2, 1974 (*see, e.g.*, A. 49-50), responded by reasserting the confidentiality of their submissions (*see, e.g.*, A. 55-64).

On March 28, 1975, the CPSC decided to release both the basic "TV-related accident" information that had been submitted pursuant to its special orders and subpoenas and the computer printout, despite the numerous defects in the data supplied and the printout (A. 132 ¶ 19). Letters dated April 7 and 8, 1975 notifying the manufacturers of this determination (*see, e.g.*, A. 65-66) were accompanied by copies of a memorandum dated March 21, 1975 prepared by Edward J. Cull, an attorney in the CPSC's Office of General Counsel ("the Cull Memorandum") (A. 67-76), which the CPSC said "formed the basis" for its decision to disclose the material (*see, e.g.*, A. 66; *see also* A. 132 ¶ 19). The Cull Memorandum "recognized that some television manufacturers have apparently been more conscientious in compiling accident data than others and thus, the release of the accident data might be misleading in some cases" and recommended that the CPSC offer to accompany the release of the data with a statement reflecting this fact (A. 75-76). On the other hand, the Cull Memorandum concluded that the information was not exempt from disclosure under the

6. The FOIA requests were later extended by the CPSC to cover the information submitted in response to the subpoenas as well (A. 153, 159; *see* A. 129 ¶ 12).

FOIA as confidential commercial information, and that even if the information were so exempt it should be disclosed because "[t]he release of the accident data would assist consumers to better evaluate the safety of TVs" (A. 73; *see also* A. 134 ¶ 29).

District Court Proceedings

Upon being advised that the CPSC had decided to disclose their "TV-related accident" submissions to the public, the twelve respondents promptly brought suit in various federal judicial districts [7] against the CPSC seeking to enjoin the disclosure. Temporary restraining orders prohibiting the disclosure of the information *pendente lite* were entered (*see, e.g.*, A. 78-79), and the actions were eventually consolidated before Chief Judge Latchum of the United States District Court for the District of Delaware (A. 80), where the majority of them had been brought.

On October 23, 1975, after discovery and extensive briefing and oral argument, Judge Latchum preliminarily enjoined the CPSC from disclosing the requested information (A. 89-91) on the ground that the CPSC had failed to comply with Section 6(b)(1) of the CPSA.[8] **GTE Sylvania, Inc. v. CPSC,** 404 F. Supp. 352 (D. Del. 1975) (A. 92-124). Judge Latchum held that Section 6(b)(1) imposes three "affirmative obligations" that "cannot flippantly be avoided" but must be fulfilled before the CPSC may publicly disclose, pursuant to the FOIA or otherwise, information from which the identity of a manufacturer can be readily ascertained (A. 116); that "[f]ailure to comply with any one of the standards means that disclosure would be improper" (A. 115); and that none of the standards had been met here. Thus, the District Court concluded that:

1. The CPSC had failed to take "reasonable steps to assure" that the information it proposed to release was "accurate" because the CPSC had "demand[ed] submission of inaccurate [unverified] data" (A. 117-18), had "refused to take any steps to ameliorate the situation" caused by the ambiguities in its information requests (A. 118), and had failed to seek full compliance with its subpoenas "to remedy the incomplete responses of some manufacturers" (A. 118).

2. Disclosure would not be "fair in the circumstances" since the information "could unjustifiably damage the manufacturers because the data does not form a reliable foundation for safety comparison —the only contemporaneous reason given by the Commission for the release of the information" (A. 120) (footnote omitted). In fact, "the public would be misled" by the information, all the more so because release of information by the government "carries with it an aura of authenticity which cannot be ignored" and because the computer printout "creates an impression of accuracy" that "aggravate[s] the problem" (A. 120 & n. 87).

7. The following manufacturers filed actions in the District of Delaware: GTE Sylvania (No. 75-104), RCA (No. 75-108), Magnavox (No. 75-112), Zenith (No. 75-113), Motorola (No. 75-114), Warwick (No. 75-115), and Ford (formerly Philco Ford) (No. 75-116). Matsushita (No. 75-2040), Sharp (No. 75-2049), and Toshiba (No. 75-2050) filed in the Southern District of New York, General Electric in the Northern District of New York (75-CV-189), and Admiral in the Western District of Pennsylvania (No. 75-531).

8. Judge Latchum did not rule on the applicability of the Trade Secrets Act, 18 U. S. C. § 1905, or Section 6(a)(2) of the CPSA, 15 U. S. C. § 2055(a)(2), both of which had also been asserted by the manufacturers as bases for enjoining disclosure.

3. "[I]t is clear that the materials which the Commission proposes to disclose cannot aid consumers in determining which television manufacturer has the safest product, and therefore would not be 'reasonably related to effectuating the purpose of [the CPSA]'" (A. 121).

The preliminary injunction remained in effect until December 8, 1977, when, after further briefing and argument, Judge Latchum granted the manufacturers' motions for summary judgment and entered a permanent injunction. **GTE Sylvania, Inc. v. CPSC,** 443 F. Supp. 1152 (D. Del. 1977) (Pet. App. 77a-104a). In issuing the permanent injunction, Judge Latchum noted that "the undisputed facts upon which the Court based its earlier decision [had] not changed" and that the CPSC still had not complied with Section 6(b)(1) (Pet. App. 79a).[9]

Affirmance by the Court of Appeals for the Third Circuit

On April 30, 1979, a panel of the United States Court of Appeals for the Third Circuit (Seitz, Chief Judge, and Gibbons and Higginbotham, Circuit Judges) affirmed Judge Latchum's permanent injunction in its entirety. **GTE Sylvania, Inc. v. CPSC,** 598 F. 2d 790 (3d Cir. 1979) (Pet. App. 1a-70a).

In an extensive opinion by Chief Judge Seitz, the unanimous panel noted that the CPSC had not challenged

9. On December 22, 1977, Judge Latchum denied the CPSC's motion to alter or amend the judgment to permit the disclosure of the information if the agency did comply with Section 6(b)(1) (A. 174-75), noting once again that the CPSC had made no showing of "its ability and willingness to take reasonable steps to assure the accuracy of the unverified material gathered in 1974 and to satisfy the other requirements of Section 6(b)(1)" (A. 175).

on appeal Judge Latchum's determination that the disclosure of the misleading, inaccurate, and unverified information it had demanded from the manufacturers would not satisfy the requirements of Section 6(b)(1) of the CPSA because the CPSC had failed to "take reasonable steps" to assure the accuracy, fairness, and relevance to the CPSA's purposes of the information (*see* Pet. App. 26a-27a). The Court of Appeals then held that compliance with Section 6(b)(1) was required here since the provision was clearly designed to "protect manufacturers from the harmful effects of inaccurate or misleading public disclosure by the Commission, through any means," whether in response to the FOIA or otherwise, of information "obtained pursuant to [the] broad information-gathering powers" uniquely afforded the agency by the CPSA (Pet. App. 59a).[10]

10. In reaching this conclusion, the Court of Appeals rejected the reasoning and holding of **Pierce & Stevens Chem. Corp. v. CPSC,** 585 F. 2d 1382 (2d Cir. 1978), which had approved the CPSC's narrow reading of Section 6(b)(1) to exclude from that provision's mandate disclosures in response to FOIA requests.

SUMMARY OF ARGUMENT

Section 6(b)(1) of the CPSA requires that, before publicly disclosing information obtained pursuant to the Act from which the identity of a manufacturer "may be readily ascertained," the CPSC "shall take reasonable steps to assure" that the information "is accurate, and that such disclosure is fair in the circumstances and reasonably related to effectuating the purposes of [the Act]." 15 U. S. C. § 2055(b)(1).

In this case the CPSC used its broad information-gathering powers under the CPSA to obtain highly confidential proprietary information from the manufacturers and then decided to disclose to the public not only the underlying information but also a computer printout prepared from it, both of which clearly identify the manufacturers. The CPSC concedes that the information it proposes to disclose is inaccurate and would be misleading to the public. Moreover, it does not dispute the District Court's determination that disclosure "could unjustifiably damage the manufacturers because the data does not form a reliable foundation for safety comparison" (*see* Pet. App. 27a, *quoting* A. 120).

The CPSC has defended its decision to disclose the information despite its failure to follow the Section 6(b)(1) procedures by arguing both here and in the courts below that it is required to comply with this provision with regard only to what it terms "affirmative" disclosures of information, *i.e.*, disclosures that it "initiates." Thus the CPSC would have this Court hold that it is completely free to disclose the admittedly inaccurate and misleading information involved here so long as it does so in response to a request pursuant to the FOIA.

Contrary to the impression that the CPSC seeks to create, there is no meaningful distinction between so-called "affirmative" disclosures "initiated" by the agency and "passive" disclosures in response to FOIA requests. The artificiality of the distinction is graphically demonstrated by this case, where the CPSC in effect created the defects in the information and yet determined to release it even if disclosure were not mandated by the FOIA. The fact that the requesters are "consumer groups" undoubtedly planning no less widespread dissemination of the information than the agency itself would undertake is a further indication of the total lack of merit in the CPSC's position. Further, the argument that FOIA disclosures do not involve any CPSC "endorsement" ignores both the language of Section 6(b)(1) and the fact that as a practical matter the public necessarily will give more credence to information when it comes from the government by whatever means.

Neither the language nor the contemporaneous legislative history of Section 6(b)(1) supports the illogical distinction that is said to exist between public disclosure of information "initiated" by the CPSC and public disclosure of the very same information in response to an FOIA request. Quite to the contrary, the language of the CPSA plainly indicates that disclosures in response to FOIA requests are "public disclosures" within the meaning of Section 6(b)(1), and the FOIA itself confirms this. Similarly, the history of the CPSA's enactment reflects a clear Congressional concern about the harm that would be done by *any* public disclosure of inaccurate or misleading information identifying particular manufacturers.

The CPSC and *amicus curiae* Consumer Federation of America ("CFA") [11] argue at length that the agency's

11. CFA also participated as *amicus* in support of the CPSC's position in the Court of Appeals (*see* Pet. App. 27a).

reading of Section 6(b)(1) is necessary in order to avoid a conflict between that provision and the FOIA. But nothing in the FOIA requires Section 6(b)(1) to be inapplicable to disclosures made in response to FOIA requests. Obviously, there is an inconsistency between the philosophy of a specific non-disclosure statute prohibiting release of information and the general pro-disclosure objective of the FOIA. However, Exemption 3 of the FOIA, 5 U. S. C. § 552(b)(3), is designed to allow the specific non-disclosure statute to control, as indeed it must in order to carry out the Congressional intent in enacting it. Here the Congressional concern about unfair harm to manufacturers' reputations that gave rise to the enactment of Section 6(b)(1) clearly outweighs the more general policies of the FOIA. In any event, the inconsistencies alleged to exist between the procedures established by the FOIA and those of Section 6(b)(1) are completely contrived, and the CPSC's complaint that the decision below will impose an undue administrative burden upon it is both speculative and unrealistic.

The two additional arguments raised by the CPSC are equally without merit. The Congressional intent in enacting Section 6(b)(1) is directly contrary to the CPSC's so-called "administrative interpretation" (adopted only after commencement of this litigation) that the statute does not apply when there has been an FOIA request for the information involved. The other assertion, that the CPSC's erroneous "interpretation" was later approved by Congress, is no more tenable, since Section 6(b)(1) has never been amended and there has been no subsequent legislation declaring the intent of the 1972 Congress in initially enacting it.

ARGUMENT

THE CONSUMER PRODUCT SAFETY COMMISSION WAS PROPERLY ENJOINED FROM PUBLICLY DISCLOSING INACCURATE AND MISLEADING INFORMATION IDENTIFYING THE RESPONDENT MANUFACTURERS SINCE IT FAILED TO COMPLY WITH THE THREE REQUIREMENTS OF SECTION 6(b)(1) OF THE CONSUMER PRODUCT SAFETY ACT.

I.

As This Case Shows, There Is No Logical Distinction Between Disclosures of Information "Initiated" by the CPSC and Disclosures in Response to FOIA Requests.

The position of the CPSC in this litigation hinges on its oft-repeated, but totally unsubstantiated, assertion that there is some undefined difference between so-called "affirmative" disclosures of information "initiated" by the CPSC, on the one hand, and mere compliance with an FOIA request, on the other. As the facts of this case clearly demonstrate, no meaningful distinction exists between these two types of public disclosures. Moreover, the CPSC's position ignores the practical reality that the disclosure of information to an FOIA requester who is completely free to broadcast that information as widely as it chooses can have exactly the same effect as a so-called "affirmative" disclosure of the information "initiated" by the CPSC.

A. The CPSC May Not Disclaim Responsibility for the Disclosure of Inaccurate and Misleading Information That It Voluntarily Determined First To Collect and Then To Release.

This case effectively illustrates the error of the CPSC's claim that any disclosure of information in response to an FOIA request is "passive" or involuntary. Not only did the CPSC determine to collect inaccurate and misleading information here when it knew that that information was the subject of FOIA requests, but it also determined to disclose the information whether or not the FOIA required disclosure.

A crucial finding made by the District Court (*see* A. 118-19) and relied on by the Court of Appeals (*see* Pet. App. 68a) is that the CPSC was directly responsible for the inaccuracy and the misleading nature of the information obtained from the manufacturers. The general unreliability of the unverified hearsay information that the CPSC demanded was fully recognized by the CPSC engineer (A. 225, 296) who served as project director for the investigation (A. 97 n. 18). Moreover, the agency was forewarned of the inevitable consequences of its failure to define the term "TV-related accident" (A. 299-301) and was well aware of the wide differences among the submissions of the various manufacturers that made them noncomparable (A. 238, 248, 256-57, 259, 290-91). Accordingly, the defects in the data were largely created by the CPSC and cannot be shrugged off by its suggestion that it merely responded to FOIA requests passively and involuntarily.

Highlighting the active role played by the CPSC here is the fact that the initial FOIA requests for the information (A. 136-40) were made more than a month *before* the

agency issued the subpoenas pursuant to which the bulk of the information was submitted (A. 100 n. 29, 286). Many of the problems in the CPSC's information collection processes came to light between the time of the initial requests (which the agency extended to include the responses to the subpoenas as well as to the special orders (A. 153, 159; *see* A. 129 ¶ 12)) and the date of issuance of the subpoenas. Yet the CPSC did nothing to cure these problems. The agency acted only to smooth the way for the eventual release of the information pursuant to the FOIA, even going so far as to computerize the information at least, in part for that purpose (*see* p. 6 n. 5, *supra*).

Indeed, despite all of the acknowledged defects in the information, the CPSC, as a discretionary matter, made a deliberate determination to disclose it to the public in a form that would identify the manufacturers. That determination cannot be squared with the CPSC's assertion before this Court that the question whether Section 6(b)(1) of the CPSA applies to disclosures in response to FOIA requests "must be resolved on the assumption that . . . the Commission, like any other federal agency, has no choice but to comply with a FOIA request" (CPSC Brief at 22 n. 7). In fact, the CPSC has made a general policy decision to exercise the widest possible discretion in favor of disclosing material responsive to FOIA requests even when it need not do so.[12] That policy is evident in the

12. During a 1976 oversight hearing, Richard O. Simpson, then Chairman of the CPSC, reported that the agency had adopted an "extremely liberal interpretation" of the FOIA, one requiring "release of all material requested, notwithstanding the available withholding exemptions" granting the agency discretion to deny a request. Regulatory Reform: Hearings Before the Subcomm. on Oversight & Investigations of the House Comm. on Interstate & Foreign Commerce, 94th Cong., 2d Sess., Vol. IV at 7 (1976) ("Oversight Hearings"). The CPSC's formal regulations expressly adopt this policy as well. *See* 16 C. F. R. § 1015.15(b).

CPSC's determination that the information involved here should be disclosed and cuts strongly against any argument that the agency "has no choice" but is required to disclose the information by the FOIA.

It is clear that the CPSC made a discretionary decision to disclose the information to the public and did not just passively agree to make it available to the requesters pursuant to the FOIA. The Cull Memorandum that "formed the basis for the Commission's decision" (A. 66) to disclose the information asserted that, even if the information were exempt from compulsory disclosure pursuant to the FOIA, it should be released "to the public" (*not* "to the requesters") because its disclosure would effectuate one of the purposes of the CPSA by "assist[ing] consumers to better evaluate the safety of TVs" (A. 73). Even Constance B. Newman, then Vice Chairman of the CPSC, later stated (in an affidavit seeking to support the CPSC's motion for summary judgment) that "the Commission decided to release the accident information in an effort to comply with the intent of the Freedom of Information Act *and to further the public interest*" and that "[t]he Commission believed that disclosure of the information would serve the important purpose of informing the public" (A. 134 ¶ 29) (emphasis added).

Of course, the CPSC's assertions that release of the information would aid the public in evaluating the safety of television sets are directly contradicted by the admissions of the people at the CPSC most knowledgeable about it (the CPSC's project director (A. 240-41, 268, 288) and its consultant (A. 152, 256-57)) that comparison among manufacturers on the basis of the collected information would *not* be proper and would *not* aid in making safety comparisons or serve any other useful purpose.

Significantly, the CPSC does not, and cannot, challenge Judge Latchum's finding that disclosure of the information would not further the purposes of the CPSA (*see* A. 121). Thus it is not disputed that, but for the FOIA requests, Section 6(b)(1) would prevent the CPSC from disclosing the information (*see* Pet. App. 26a). Nevertheless, the CPSC determined that the information should be released to the public. That decision, like the initial decision to collect the information, simply cannot be reconciled with the CPSC's argument that it was compelled to release the information in order to fulfill what it perceives as its obligations under the FOIA.

B. The CPSC's Disclosure of Information to an FOIA Requester Can Accomplish Exactly the Same Harm as a Disclosure "Initiated" by the Agency.

As we demonstrate below (*see* pp. 28-35, *infra*), Section 6(b)(1) was enacted to protect manufacturers from the harm that might result from disclosure by the CPSC of inaccurate or misleading information about them. That protection is equally necessary whether disclosure is made via a press release or in response to an FOIA request, because the harm that could be done is precisely the same. The argument that only disclosures "initiated" by the CPSC carry the agency's "endorsement" (*see* CPSC Brief at 20) is not supported by Section 6(b)(1) and ignores the fact recognized by the District Court that *any* release of information by the government automatically "carries with it an aura of authenticity" (A. 120 n. 87).

It cannot be denied that even a single FOIA requester is a member of the "public" (*see* pp. 24-25, *infra*). Moreover, as noted by the Court of Appeals, the CPSC "[has] no control over the use to which [the information] might be put by the requesters" (Pet. App. 68a). Since a re-

quester is free to broadcast widely any information it obtains, disclosure easily can extend far beyond the requester to the world at large. Nor are requesters limited to individuals; they often are "consumer groups" like the requesters here.

In fact, the FOIA was enacted with the expectation that the press would be its major user, and the statute was designed to give the press access to information contained in government files so that it could pass this information on to the general public.[13] As Professor Ernest Gellhorn notes, this widespread broadcast of information received pursuant to an FOIA request is the logical equivalent of publicity undertaken by the agency itself:

> "When media coverage closely follows agency activities, affirmative publicity measures [by the agency] may be unnecessary because mere freedom of public access to information performs the same function . . . . In such a case, the issues involved in the Freedom of Information Act cannot be disentangled from adverse publicity issues." [14]

The capacity for widespread broadcast of a disclosure made in response to an FOIA request is vividly illustrated by the present case. As noted by the Court of Appeals, one of the requesters here is the publisher of *Consumer Reports* and disclosure to that requester alone "may have widespread adverse effects on [the manufacturers'] business reputations" (Pet. App. 68a-69a n. 6). The damage would be at least as great as the harm that would result from the disclosure of the information by a so-called "affirmative" press release "initiated" by the CPSC. Indeed, it is hard to imagine that any significant harm would be done by the government's disclosure of information in most cases were it not for the media's coverage of that disclosure.[15]

13. *See, e.g.*, 112 Cong. Rec. 13,642 (1966) (remarks of Rep. Moss); *id.* at 13,648 (remarks of Rep. Pucinski). The press not only championed the legislation that resulted in the FOIA but played a major role in its enactment. *See, e.g.*, 112 Cong. Rec. 13,652 (1966) (remarks of Rep. Shriver); *id.* at 13,642-43 (remarks of Rep. Moss); H. R. Rep. No. 1497, 89th Cong., 2d Sess. 2-3 (1966).

14. Gellhorn, **Adverse Publicity by Administrative Agencies,** 86 Harv. L. Rev. 1380, 1422 n. 164 (1973).

The CPSC claims that Section 6(b)(1) is brought into play only for so-called "affirmative" disclosures because it is only these disclosures that bear the agency's "endorsement" or "official 'seal of approval' " (CPSC Brief at 20, 21; *see also* CFA Brief at 15-16). Surely this is not correct, for it would permit the CPSC to disclose inaccurate or misleading information identifying a manufacturer any time it wished merely by issuing an accompanying statement that it was not vouching for or "endorsing" the accuracy of the information. Even the CPSC does not argue that Section 6(b)(1) may be circumvented in that way. Nowhere is there any indication that the provision is applicable only where the information to be disclosed has the agency's "endorsement."

15. This fact was noted in the legislative history of the CPSA, where Representative Crane cited the damage to duPont's reputation resulting from the FTC's erroneous charges concerning Zerex antifreeze as a reason why the CPSC should not even be created. 118 Cong. Rec. 31,389 (1972) (quoted in CPSC Brief at 35 n. 14). Even though the FTC dropped the charges a year later, news coverage of the retraction paled in comparison to the earlier publicity, and in any event "[t]he financial damage had, of course, already been done." *Id.*

Two other examples of the disastrous effects of the media's coverage of precipitous releases of inaccurate information by the government are the 1959 cranberry scare and the 1977 alarm concerning botulism in green beans canned by Stokely-Van Camp. *See* Gellhorn, **Adverse Publicity,** *supra,* 86 Harv. L. Rev. at 1408-09, 1415 n. 142.

In fact, *any* purported product safety information coming from the files of an agency charged with detecting safety hazards carries with it an aura of accuracy. Rightly or wrongly, the public will give more credence to information simply because it comes from the government.[16] This is particularly true where, as here, the information does not just happen to be in the agency's files but was submitted by the very businesses involved in response to the agency's demands.[17] The perception of reliability is further heightened when the information that has been disclosed is then broadcast by "consumer groups" like the requesters here.

* * *

In sum, there is no rational way to distinguish between so-called "affirmative" and "passive" disclosures of information by the CPSC. That being the case, logic requires that Section 6(b)(1) apply to *all* public disclosures of information identifying specific manufacturers, no matter how "initiated."

II.

The Statutory Language Leaves No Room for Doubt That Section 6(b)(1) of the CPSA Applies to All Public Disclosures of Information by the CPSC, Including Disclosures in Response to FOIA Requests.

Nothing in the language of Section 6(b)(1) supports the CPSC's disingenuous argument that the provision's

16. For example, while the FBI might maintain that its "raw files" do not have the agency's imprimatur as to accuracy, the information in these files once released by the FBI would undoubtedly receive a certain amount of public acceptance.

17. This fact alone distinguishes the instant case from the situation involved in **Pierce & Stevens Chem. Corp. v. CPSC**, 585 F. 2d 1382 (2d Cir. 1978), a case relied upon by the CPSC in its Petition for Certiorari and cited in its Brief on the merits.

protection against public disclosure of inaccurate or misleading information about named manufacturers is limited to instances of so-called "affirmative" disclosures "initiated" by the agency. Neither of these words is found *anywhere* in the CPSA. In fact, the plain language of the CPSA and of the FOIA unequivocally establishes that the disclosure of information in response to an FOIA request comes within the ambit of Section 6(b)(1).

A. The Language of Sections 6(a) and 6(b)(1) of the CPSA Plainly Indicates That Section 6(b)(1) Applies to Disclosures of Information in Response to FOIA Requests.

It is axiomatic that, in determining the meaning of a statute, courts are to presume that its terms are "used in their ordinary and usual sense and with the meaning commonly attributed to them." **Caminetti v. United States**, 242 U. S. 470, 485-86 (1917); *see* **NLRB v. Plasterers' Local 79**, 404 U. S. 116, 129 n. 24 (1971). The words of Section 6(b)(1) clearly indicate that the provision applies to the CPSC's disclosure of information in response to an FOIA request. This conclusion is amply supported by the language of Section 6(a) of the CPSA as confirmed by the FOIA itself.

By its terms Section 6(b)(1) governs "public disclosure" and information "to be disclosed to the public." Since FOIA requesters are members of the "public" and are described as such in the FOIA, a disclosure pursuant to the FOIA is clearly a "public disclosure" within the plain meaning of this provision.[18]

18. Both the CPSC and CFA suggest that Section 6(b)(1) applies only to "dissemination" of information initiated by the CPSC and not mere compliance with an FOIA request (*see, e.g.*, CPSC Brief at 15-17, CFA Brief at 15-16). While the term "dissemination" is used in some provisions of the CPSA and in its

The CPSC and CFA contend that the use of the word "public" in Section 6(b)(1) means that in order for the provision to apply, something more than disclosure in response to an FOIA request is required (*see* CPSC Brief at 30 n. 12, CFA Brief at 13). But as noted by the Court of Appeals (*see* Pet. App. 36a), another provision of Section 6 of the CPSA (Subsection 6(a)) clearly applicable to FOIA requests appears with the provision involved here (Subsection 6(b)(1)) under the general caption "*Public* disclosure of information" (emphasis added).[19] If Congress had intended to exclude FOIA requests from the term "public disclosure" as used in Section 6(b)(1), it surely would not have placed Section 6(a) under a caption that employs that very phrase.

As recognized by the Court of Appeals (*see* Pet. App. 35a-36a), Section 6(a) evidences Congressional awareness that FOIA requests would be made for information gathered by the CPSC, and its placement in the CPSA demonstrates that Congress viewed responses to such requests as "public disclosures." Moreover, the very language of Section 6(a)(1) establishes that compliance with an FOIA request is one type of disclosure of information "to the public" within the meaning of Section 6(b)(1).[20]

18. (Cont'd)
legislative history, it does not appear in Section 6(b)(1), the statutory provision at issue. In any event, it is difficult to perceive how the CPSC's disclosure of the information at issue here to FOIA requesters, particularly those involved in this litigation, would not constitute "dissemination" as that term is ordinarily used.

19. Section 6(a)(1) expressly refers to the FOIA and provides that the CPSC may withhold from the public information that is exempt from mandatory disclosure under that statute or "is otherwise protected by law from disclosure to the public." 15 U. S. C. §2055(a)(1).

Section 6(a)(2) of the CPSA provides that trade secrets and other information protected by the Trade Secrets Act, 18 U. S. C. § 1905, "shall be considered confidential and shall not be disclosed." 15 U. S. C. § 2055(a)(2). The CPSC and CFA concede that this provision applies to FOIA requests as well as to disclosures "initiated" by the CPSC (*see* CPSC Brief at 29-30, CFA Brief at 14).

Indeed, the FOIA itself is the clearest demonstration that the phrases "public disclosure" and disclosure "to the public" encompass disclosures in response to FOIA requests. When Congress enacted the FOIA in 1966 (six years before it enacted the CPSA), it stated in the preamble that its purpose was "to clarify and protect the right *of the public* to information."[21] The statute is codified at Section 552 of Title 5, which is captioned "Public information," and it repeatedly refers to disclosing information to the "public."[22] Indeed, the House Report on the FOIA states that the statute is designed to provide access to government records to "*the public at large.*"[23] If in enacting the CPSA Congress had intended to change the obvious implication that disclosures in response to FOIA requests are "public" disclosures, it certainly would have made this intention plain.

B. Other Provisions of the CPSA Also Demonstrate That Section 6(b)(1) Applies to Disclosures in Response to FOIA Requests.

Two other provisions of the CPSA also offer significant support for the conclusion that Section 6(b)(1) is

20. The Conference Report on the CPSA also clearly indicates that FOIA disclosures are "public" disclosures (*see* p. 30, *infra*).

21. Pub. L. No. 89-487, 80 Stat. 250 (1966) (emphasis added).

22. For example, 5 U. S. C. § 552(a) states that agencies must "make available" certain types of records "to the public"; 5 U. S. C. § 552(a)(1)(A) requires an agency to "publish . . . for the guidance of the public" descriptions of the ways in which "the public may obtain information"; and 5 U. S. C. § 552(a)(4)(A) refers to "the public interest" and the "general public."

23. H. R. Rep. No. 1497, 89th Cong., 2d Sess. 1 (1966) (emphasis added).

applicable to the disclosure of information in response to an FOIA request.

As was correctly noted by the Court of Appeals (*see* Pet. App. 39a), Section 25(c) of the CPSA, 15 U. S. C. § 2074(c), demonstrates that Section 6(b)(1) is applicable to at least some information obtained or generated by the CPSC, the disclosure of which could be requested under the FOIA. When Congress enacted Section 6(b)(1), it also enacted Section 25(c), which requires the CPSC to make "available to the public" accident and investigation reports generated by the CPSC even if the reports would be exempt from disclosure under the FOIA, *but only to the extent permitted by Sections 6(a)(2) and 6(b)(1).*[24]

There is no doubt that, in using the words "available to the public" in Section 25(c), Congress was referring to disclosures in response to FOIA requests. The House Report on the CPSA states that Section 25(c) is a limitation on the CPSC's authority to deny access to investigatory files under Exemption 7 of the FOIA, 5 U. S. C. § 552(b)(7).[25] Thus, even if Section 6(b)(1) were interpreted to be inapplicable to FOIA disclosures as urged by the CPSC and CFA, it nevertheless would be

24. Section 25(c) provides in pertinent part:

"Subject to [Sections 6(a)(2) and 6(b)] of this [Act] but notwithstanding [Section 6(a)(1)] of this [Act], (1) any accident or investigation report made under this [Act] by an officer or employee of the Commission shall be made available to the public in a manner which will not identify any injured person . . . ."

25. H. R. Rep. No. 1153, 92d Cong., 2d Sess. 31 (1972).

Section 25(c)'s reference to FOIA disclosures in the words "available to the public" reinforces the ordinary and natural reading of the phrase "public disclosure" as used in Section 6(b)(1) to include disclosures in response to FOIA requests.

applicable to some FOIA disclosures by virtue of Section 25(c). There is not a shred of evidence that Congress intended such an internal inconsistency in the CPSA. Accordingly, Section 6(b)(1) must apply not only to *some* but to *all* FOIA requests.

Additionally, and "[m]ost significantly" from the viewpoint of the Court of Appeals (Pet. App. 38a), Section 6(b)(2) of the CPSA, 15 U. S. C. § 2055(b)(2), contains specific exceptions to the requirements of Section 6(b)(1).[26] But the list of those exceptions does not include the disclosure of information in response to an FOIA request. As the Court of Appeals aptly stated, if Congress had intended to exclude FOIA disclosures from Section 6(b)(1), "it would have done so explicitly in section 6(b)(2)" (Pet. App. 38a). *See* **Andrus v. Allard,** — U. S. —, —, 100 S. Ct. 318, 322 (1979); **TVA v. Hill,** 437 U. S. 153, 173 (1978). Since Congress chose not to except disclosures in response to FOIA requests from the scope of Section 6(b)(1), there is no reason for this Court to do so.

* * *

Thus, far from suggesting that the CPSC's position in this litigation is correct, the language of the CPSA and of the FOIA clearly supports the holdings below that Section 6(b)(1) applies to disclosures in response to FOIA requests. Indeed, the language is so plain that no contrary decision could be justified. *See, e.g.,* **United States v. Oregon,** 366 U. S. 643, 648 (1961); **Caminetti v. United States,** 242 U. S. 470, 485, 490 (1917).

26. These exceptions involve, for example, the disclosure of information concerning an imminently hazardous product and disclosures in the course of an administrative or judicial proceeding under the CPSA.

III.

The Legislative History of the CPSA Confirms That in Enacting Section 6(b)(1) Congress Sought To Safeguard Manufacturers' Reputations from Harm Caused by Any Public Disclosure of Inaccurate or Misleading Information.

The Court of Appeals examined the legislative history of Section 6(b)(1) at great length and concluded that "[t]here is not an inkling of support" for the CPSC's self-serving assertion that Congress intended Section 6(b)(1) to apply only when the CPSC "initiates" disclosure (Pet. App. 54a).[27] To the contrary, the conclusion compelled by the face of the statute is reinforced by its legislative history.

1. The Congress that enacted the CPSA gave the CPSC extraordinary powers not previously accorded to any other government agency to gather, analyze, and disseminate vast amounts of private information.[28] It also imposed specially tailored safeguards to protect manufacturers' reputations from damage arising from improper disclosure of this information. As the House Report on the CPSA noted:

> "If the Commission is to act responsibly and with adequate basis, it must have complete and full access to information relevant to its statutory responsibilities. Accordingly, the committee has built into this bill broad information-gathering powers. It recognizes

27. That assertion is repeated before this Court on numerous occasions (*see, e.g.*, CPSC Brief at 20-21, 23, 33; *see also* CFA Brief at 13, 15). The assertion is unaccompanied by any citation for the simple reason that there is no provision to be cited.

28. *See, e.g.*, 15 U. S. C. §§ 2054, 2064(c), 2076(e).

> that in so doing it has recommended giving the Commission the means of gaining access to a great deal of information which would not otherwise be available to the public or to Government. Much of this relates to trade secrets or other sensitive cost and competitive information. Accordingly, the committee has written into section 6 of the bill detailed requirements and limitations relating to the Commission's authority to disclose information which it acquires in the conduct of its responsibilities under this act." [29]

The Court of Appeals observed that the House Report does not support the position urged by the CPSC and CFA, since the Report "made no distinction between those aspects of section 6 expressly governing FOIA requests and the provisions of section 6(b)(1)" (Pet. App. 48a). Thus the House Report does not in any way suggest that the Section 6(b)(1) safeguards are not to apply when the CPSC discloses information in response to an FOIA request.

Nor does the Conference Report on the CPSA contain any such suggestion. Indeed, in the words of the Court of Appeals, the three substantive disclosure limitations in Section 6 (Sections 6(a)(1), 6(a)(2), and 6(b)(1)) are discussed in "almost the same breath" in a single paragraph of that Report (Pet. App. 53a), and in fact the discussion of Section 6(b)(1) is sandwiched between the discussions of Sections 6(a)(1) and 6(a)(2).[30] This treatment is in-

29. H. R. Rep. No. 1153, 92d Cong., 2d Sess. 31 (1972).

30. The Conference Report describes the provisions of Section 6 of the CPSA in part as follows:

> "Information obtained by the Commission which contained or related to a trade secret or other matter referred to in section 1905, title 18, United States Code, could not be publicly disclosed . . . . The Commission was directed to take steps to assure that publicly disclosed information from which spe-

consistent with the distinction between Sections 6(a) and 6(b) that the CPSC proposes. Moreover, the statement in the Report that no information need be "publicly disclosed" if it is exempt from disclosure under the FOIA [31] is another indication that FOIA disclosures are indeed "public" disclosures within the compass of Section 6(b)(1).[32]

2. The legislative background of Section 6(b)(1) offers further insight into the considerations of fairness to manufacturers that prompted the enactment of this provision and the Congressional intent that the provision would apply to *all* CPSC disclosures. The comments of officials in the Administration, whose proposed bill was the source of the language that eventually became Section 6(b)(1), are especially pertinent.[33] These officials clearly

30. (Cont'd)

cific manufacturers or distributors could be identified was accurate and that the disclosure was fair in the circumstances and reasonably related to carrying out its duties. No information would be required to be publicly disclosed if it is information described in Section 552(b), title 5, United States Code (relating to information which is entitled to be protected from public access under the Freedom of Information Act), or which is otherwise protected by law from disclosure to the public." H. R. Rep. No. 1593, 92d Cong., 2d Sess. 40-41, *reprinted in* [1972] U. S. Code Cong. & Ad. News 4596, 4632-33.

31. *Id.*

32. Similarly, in commenting on an early Senate version of the CPSA, the Office of Management and Budget employed the term "public disclosure" to refer to information released under the FOIA. S. Rep. No. 749, 92d Cong., 2d Sess. 124 (1972).

33. In 1971, proposed consumer product safety legislation was introduced on behalf of the Administration in both the Senate (S. 1797) and the House (H. R. 8110). Section 4(c) of these two bills contained information disclosure limitations virtually identical to those eventually enacted in Section 6(b)(1) of the CPSA (*see* Pet. App. 43a-44a for the language of the Administration's proposal). Although the bill passed by the Senate omitted these safe-

considered it essential to have safeguards in the CPSA against *any* disclosure of inaccurate and misleading information that would identify a particular manufacturer.

For example, as noted by the Court of Appeals, the analysis of Section 6 provided by Elliott L. Richardson, Secretary of the Department of Health, Education, and Welfare (the agency that initially drafted the provision), "made no distinction between the methods of information disclosure that were to be covered by [Section 6(a)] and [Section 6(b)]" (Pet. App. 48a).[34] Similarly, the General Counsel of the Department of Commerce wrote:

> "[W]e believe that in the interest of fairness the disclosure of *any* information should be attendant with safeguards. These include prior notice to manufacturers, the right of the manufacturer to rebut

33. (Cont'd)

guards (*see* S. Rep. No. 749, 92d Cong., 2d Sess. 49, 51 (1972) and 118 Cong. Rec. 21,903 (1972)), the bill passed by the House (H. R. 15003) incorporated the Administration's proposal in all significant respects. *See* H. R. Rep. No. 1153, 92d Cong., 2d Sess. 5, 24 (1972); 118 Cong. Rec. 31,411 (1972). The information disclosure limitations embodied in the House bill were accepted by the Conference Committee and ultimately became law. *See* H. R. Rep. No. 1593, 92d Cong., 2d Sess. 7, *reprinted in* [1972] U. S. Code Cong. & Ad. News 4596, 4633; 118 Cong. Rec. 36,046 (1972); *id.* at 36,199.

34. Consumer Product Safety Act: Hearings on H. R. 8110, H. R. 8157, H. R. 260, & H. R. 3813 Before the Subcomm. on Commerce & Finance of the House Comm. on Interstate & Foreign Commerce, 92d Cong., 1st & 2d Sess. 188 (1971-72) ("House Hearings") (quoted by the Court of Appeals at Pet. App. 47a).

In paraphrasing what is now Section 6(b)(1) for the Senate Committee, Secretary Richardson also made no distinction between the types of disclosure to which it was intended to apply. Consumer Product Safety Act: Hearings on S. 983, S. 1685, & S. 1797 Before the Senate Comm. on Commerce, 92d Cong., 1st Sess. 124 (1971) ("Senate Hearings"). Thus, the CPSC's reliance on this testimony to support its position (*see* CPSC Brief at 34) is entirely misplaced.

false information, and a requirement that the information be fair and accurate." (emphasis added).[35]

Neither Department would have treated disclosures in response to FOIA requests differently from disclosures "initiated" by the CPSC.

Other Administration officials stressed that "information concerning consumer products which may be wholly or partially inaccurate can be very damaging to a business enterprise and misleading to the consumer" [36] and pointed out that protecting companies against disclosure of inaccurate or misleading information would also benefit consumers and the government "by promoting accuracy of information released [and] foster[ing] willingness of manufacturers to cooperate in furnishing the information necessary for prompt and vigorous product safety enforcement." [37] There is no indication in any of these statements that the Administration's concern was in establishing safeguards that would be applicable only for so-called "affirmative" CPSC disclosures.

3. The apprehensions of industry spokesmen also were addressed to *any* disclosure of misleading or inaccurate information about named manufacturers, regardless of the form of disclosure. Contrary to the CPSC's contention (*see* CPSC Brief at 33), industry statements do not reflect a concern only as to the impact of adverse public disclosures "initiated" by the CPSC.

35. S. Rep. No. 749, 92d Cong., 2d Sess. 100 (1972); *accord*, *id.* at 102.

36. *Id.* at 124 (letter of Frank Carlucci, Associate Director, Office of Management and Budget); *see id.* at 96, 97 (letter of Richard Kleindeinst, Deputy Attorney General).

37. *Id.* at 79 (statement of Virginia Knauer, Special Assistant to the President for Consumer Affairs); *see also* House Hearings, *supra* p. 31 n. 34, at 969-70 (remarks of Elliot L. Richardson, Secretary, Department of Health, Education and Welfare).

The remarks of the General Electric Company representative upon which the CPSC relies did deal largely with the serious impact that would be created by the disclosure of premature, inaccurate, or misleading information "[i]ssued under the dignity and with the apparent imprimatur of the U. S. Government." [38] Nothing even in these remarks indicates a belief that such an "apparent" imprimatur exists only when the CPSC "initiates" the disclosure.[39] Moreover, as stated by the Court of Appeals, "others who spoke in behalf of [the Administration bill] favored its disclosure provisions on more general grounds" (Pet. App. 46a).[40]

38. *Id.* at 1065-66 (remarks of James F. Young, Vice President, General Electric Company) (quoted in CPSC Brief at 34).

39. Each of the other statements cited by the CPSC as dealing only with so-called "affirmative disclosures" to the same effect (*see* CPSC Brief at 34) either is irrelevant or in fact cuts against the CPSC's position.

The first three references are statements not of industry but of the National Commission on Product Safety ("NCPS"), the predecessor of the CPSC, and focus not on Section 6(b)(1) but on what was perceived as a general need for information about product defects to be available to the public. *Id.* at 306-07, 432, 446-47. The NCPS had proposed model product safety legislation but, as noted by the Court of Appeals (*see* Pet. App. 45a), the House bill introduced by Representative Moss modeled on the NCPS proposal did not contain the safeguards against disclosure of inaccurate or misleading information that were enacted in Section 6(b)(1). Accordingly, the NCPS's statements and comments of others on the NCPS proposal (*e.g.*, *id.* at 1210-11) should be given no weight. The same is true of Representative Moss's remarks (*id.* at 910), which also are cited by the CPSC.

The other industry statements cited by the CPSC either make no distinction between agency-initiated disclosures and disclosures to FOIA requesters (*id.* at 1130, 1318) or explicitly state that the Section 6(b)(1) disclosure limitations should apply to *all* CPSC disclosures (*id.* at 776, 1196-97, 1237).

The CPSC also lists as the remarks of an industry spokesman a statement of HEW Secretary Richardson (*id.* at 969), whose overall testimony clearly does not support the CPSC's strained reading of Section 6(b)(1) (*see* p. 31 n. 34, *supra*).

40. For example, the prepared statement of one industry representative noted:

Thus, far from supporting any distinction between the types of disclosures to which Section 6(b)(1) applies, the comments of industry further support the conclusion that the disclosure limitations in Section 6(b)(1) were not viewed as being applicable only to disclosures "initiated" by the CPSC.[41]

* * *

The foregoing analysis of the legislative history of Section 6(b)(1) makes it crystal clear that Congress never

40. (Cont'd)

"Authority to collect and disseminate information carries with it a responsibility not to disclose data that may injure a company or reveal confidential information . . . . A statute should also assure that *any* information to be made public is accurate . . . ." (emphasis added).

Id. at 1237 (statement of George P. Lamb, General Counsel, Association of Home Appliance Manufacturers); *accord, id.* at 1197 (remarks of Bernard H. Falk, President, National Electrical Manufacturers Association) ("[n]o information should be disclosed which is inaccurate, misleading or incomplete"); *see also id.* at 1324 (prepared statement of Parts Division, Electronic Industries Association); Senate Hearings, *supra* p. 31 n. 34, at 755 (remarks of Dr. S. W. Herwald, Westinghouse Corporation, representing National Electric Manufacturers Association) ("no information should be disclosed which has not at least had a chance to have been heard as to whether somebody believes it is inaccurate or misleading").

41. Nor is there any support for the CPSC's position in the comments of individual legislators during the debates. *See, e.g.*, 118 Cong. Rec. 31,381 (1972) (remarks of Rep. Broyhill).

The reliance of the CPSC and CFA on the remarks of Representative Crane (*id.* at 31,389; *see* CPSC Brief at 34 n. 14, CFA Brief at 15 n. 14) is misplaced. As pointed out by the Court of Appeals, the fact that Representative Crane, an *opponent* of the CPSA, saw the potential for damage to the reputation of manufacturers from release of inaccurate and misleading information "*in spite of the protective provisions of section 6(b)(1)*, provides no inkling of support for the Commission's view that that section is limited to the affirmative disclosure of information" (Pet. App. 52a) (emphasis by the Court). Indeed, if anything, the CPSC's interpretation of Section 6(b)(1) would only have exacerbated the fears expressed by Representative Crane.

intended to create an unstated exception from that provision's requirements for CPSC disclosures in response to FOIA requests. As aptly summarized by the Court of Appeals:

> "[T]he only reasonable inference that can be drawn from the legislative history of section 6(b)(1) is that the members of the Administration who introduced it, the legislators who drafted it, reported it favorably for consideration by the House and then spoke in favor of its enactment, and the conferees who incorporated it into the final legislative product, did not intend that its protections from the misleading, inaccurate and unfair public dissemination of information were to be applied only to what the Commission refers to as affirmative disclosures" (Pet. App. 53a-54a).

IV.

Nothing in the FOIA Either Justifies or Supports the Conclusion That Section 6(b)(1) of the CPSA Is Inapplicable to FOIA Requests.

Both the CPSC and CFA place their principal reliance in this case on what they perceive as inherent inconsistencies between Section 6(b)(1) of the CPSA and the FOIA (*see* CPSC Brief at 15-32, CFA Brief at 6-12). However, while the disclosure limitations contained in Section 6(b)(1) are naturally "at odds" (CFA Brief at 11) with the general pro-disclosure philosophy of the FOIA, this point in no way advances the unsupportedly narrow interpretation of Section 6(b)(1) for which the CPSC and CFA argue.

Under established canons of statutory construction, the specific policies behind the enactment of Section

6(b)(1) control over the more general policies of the FOIA. Indeed, Exemption 3 of the FOIA, 5 U. S. C. § 552(b)(3), explicitly recognizes the need for accommodation between the specific restrictions of a non-disclosure statute like Section 6(b)(1) and the general pro-disclosure emphasis of the FOIA. Moreover, contrary to the arguments of the CPSC and CFA, the Court of Appeals correctly held that there is no insoluble conflict between the procedural frameworks of the two statutory schemes.

A. The General Pro-Disclosure Philosophy of the FOIA Does Not Outweigh the Specific Protections of Section 6(b)(1).

The CPSC and CFA stress the broad remedial scheme of the FOIA, which is described as being based on the concept of "mandatory prompt disclosure" (CFA Brief at 7).[42] They then argue that the reading of Section 6(b)(1) adopted by the Court of Appeals conflicts with this general philosophy of the FOIA and therefore cannot be correct. The argument ignores the specific purpose and requirements of Section 6(b)(1), which must govern over the more general philosophy of the FOIA.

Notably missing from the brief of either the CPSC or CFA is any explanation as to why the CPSA and the duties it imposes should be blithely discarded so as to permit, in the name of the FOIA, disclosure of information that the CPSC obtained only because of its information-

42. For example, the CPSC notes that the Congressional purpose in enacting the FOIA was, in the words of this Court, "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny" (CPSC Brief at 18, *quoting* **Department of the Air Force v. Rose,** 425 U. S. 352, 361 (1976)). CFA adds that "the basic principle underlying the FOIA is that the public has a right to know information upon which the government relies in making decisions, regardless of the accuracy of that information" (CFA Brief at 11).

gathering powers under the very statutory scheme it now seeks to cast aside. In fact, it is extremely doubtful that the FOIA, a general statute governing public access to information about the government, could *ever* be controlling over Section 6 of the CPSA, a statute governing such matters specifically with respect to the CPSC. **Radzanower v. Touche Ross & Co.,** 426 U. S. 148, 153 (1976); **Morton v. Mancari,** 417 U. S. 535, 550-51 (1974). The CPSC is not free to supplant its own enabling act with the FOIA.

As a statute prohibiting disclosure of certain carefully specified information, Section 6(b)(1) obviously reflects a philosophy different from the pro-disclosure policy of the FOIA. This does not create any insoluble conflict between the two statutes, all the more when Exemption 3 of the FOIA explicitly recognizes the need to accommodate non-disclosure statutes[43] and permits an agency to withhold from an FOIA requester information whose disclosure would run afoul of such statutes. If the CPSC's argument were correct, there would be no reason for Exemption 3 to have been enacted, since the FOIA would automatically control over every non-disclosure statute.[44] Obviously,

43. At one point the CPSC suggests that the inclusion, with the raw data, of a statement as to its inaccuracy might be "a sensible and fair accommodation of the manufacturers' and labelers' interests" (CPSC Brief at 7 n. 3, *quoting* **Pierce & Stevens Chem. Corp. v. CPSC,** 585 F. 2d 1382, 1388 n. 28 (2d Cir. 1978)). The disclaimer proposed in this case (*see* A. 66) would not have mentioned most of the flaws in the data collected by the CPSC that caused the District Court to describe the information as a "melange of inaccuracies" (A. 104). However, even a broader disclaimer would not have been sufficient to remove the damage to the manufacturers that the courts below correctly found Section 6(b)(1) was designed to avoid.

44. Indeed, if the general pro-disclosure philosophy of the FOIA were always controlling, there would be no exemptions of any kind from the Act.

this is not so. *See, e.g.*, **Chrysler Corp. v. Brown**, 441 U. S. 281, 317-19 (1979).

B. The Procedural Framework of the FOIA Is Not Incompatible with Section 6(b)(1).

Both the CPSC and CFA point to various aspects of the procedural framework established by Section 6(b)(1) as evidence of its inconsistency with the FOIA. However, as the Court of Appeals aptly noted, "[s]uch inconsistencies as exist between the two statutes are not unusual or uncontemplated by Congress" (Pet. App. 62a).

The CPSC and CFA first assert (*see* CPSC Brief at 23-24; *see also* CFA Brief at 7-10) that the thirty-day notice and comment provision of Section 6(b)(1) conflicts with the so-called "prompt" disclosure scheme of the FOIA requiring the agency to determine within "ten [working] days" after receipt whether or not it will comply with an FOIA request (*see* 5 U. S. C. § 552(a)(6)(A)(i)). However, as the District Court noted (*see* Pet. App. 85a), when Section 6(b)(1) was enacted in 1972 the existing FOIA provision required only that information requested be made available "promptly."[45] The ten-day rule of the FOIA was not enacted until 1974,[46] and it certainly did not repeal Section 6(b)(1). *See* **Cantor v. Detroit Edison Co.**, 428 U. S. 579, 596-97 (1976); **Regional Rail Reorganization Act Cases**, 419 U. S. 102, 133-34 (1974).

In any event, the Court of Appeals correctly pointed out (*see* Pet. App. 60a-61a) that the FOIA requires only that the decision whether to grant a request be made within ten days. The CPSC can easily satisfy this requirement by notifying the requester at the conclusion of the ten-day period either that the information will be released when Section 6(b)(1)'s notice and comment provisions have been complied with or that release will be denied initially pending compliance with the substantive provisions of Section 6(b)(1).[47] While compliance with Section 6(b)(1) may occasionally cause some delay in the release of information, it should be recognized that agencies already do not always comply with the FOIA deadlines, especially when, as here, large volumes of documents are involved, and the statute itself provides a certain grace period. *See* 5 U. S. C. §§ 552(a)(6)(B), (C); **Open America v. Watergate Special Prosecution Force**, 547 F. 2d 605, 610-13 (D. C. Cir. 1976).

The CPSC and CFA also misread Section 6(b)(1) in several different ways in an effort to demonstrate some basic incompatibility with the FOIA. Thus, for example, they argue that compliance with Section 6(b)(1)'s substantive requirements will necessarily entail "lengthy delays" (CFA Brief at 8-9; *see* CPSC Brief at 24). This is not so. Contrary to the CPSC's and CFA's suggestions, Section 6(b)(1) does not require the CPSC to verify the accuracy and fairness of each piece of information it dis-

45. Pub. L. No. 90-23, 81 Stat. 54 (1967).

46. Pub. L. No. 93-502, 88 Stat. 1561 (1974).

47. The experience of the Environmental Protection Agency illustrates the ease with which this can be accomplished. For example, the EPA has reconciled a thirty-day notice requirement in Section 10 of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U. S. C. § 136h(d), with the FOIA's ten-day rule by promulgating regulations providing that FOIA requests for information that might be entitled to confidential treatment will receive "a 'procedural' initial denial" pending a response from the submitter. *See* 41 Fed. Reg. 36,920 (1976); 40 C. F. R. § 2.204(d)(1)(ii). A similar solution has been reached with respect to the thirty-day notice provision in Section 14(c)(2)(A) of the Toxic Substances Control Act, 15 U. S. C. § 2613(c)(2)(A). *See* 40 C. F. R. § 2.306(d).

closes. The CPSC need only "take reasonable steps to assure" the accuracy and fairness of the information.[48]

The CPSC and CFA next contend that Section 6(b)(1) requires the CPSC to review and, where necessary, to correct or revise information to be disclosed, activities they assert are not contemplated by the FOIA (*see* CPSC Brief at 25; CFA Brief at 10-11). In **NLRB v. Sears, Roebuck & Co.**, 421 U. S. 132, 161-62 (1975), this Court stated that the FOIA does not require agencies to create records that did not previously exist. But neither does Section 6(b)(1). Section 6(b)(1) merely provides that if existing records are reasonably believed to be inaccurate or misleading, the CPSC may not produce them unless and until manufacturer identification is deleted. The deletion technique is fully endorsed by the FOIA (*see* 5 U. S. C. § 552(b)), and has frequently been used by the CPSC in responding to FOIA requests.[49] As recognized in **Long v. IRS**, 596 F. 2d 362, 365-66 (9th Cir. 1979), the technique is not inconsistent with this Court's holding in **Sears**.[50]

48. Of course, if the CPSC in its own discretion decides that unverified and inaccurate information is needed in its data base for rulemaking or investigatory purposes (*see, e.g.*, A. 297), then it should deny release of that information to FOIA requesters so long as it permits identification of the manufacturers.

49. *See, e.g.*, CPSC Annual Report on the Administration of the FOIA, Calendar Year 1978 (Mar. 1, 1979), at 1, 3, 4.

50. The CPSC and CFA also assert that the fairness and relatedness inquiries required by Section 6(b)(1) "involve a weighing of the identity and interest of the requester and the likely use to which he would put the information sought," and that these concerns are "impermissible in connection with FOIA requests" (CPSC Brief at 26; *see also* CFA Brief at 11-12). Again, there is nothing in Section 6(b)(1) to support this claimed construction of the statute. If a manufacturer is entitled to have information protected from public disclosure, then any disclosure is barred.

Additionally, the CPSC and CFA profess themselves unable to contemplate how the FOIA can be squared with Section 6(b)(1)'s requirement that the CPSC "publish a retraction" of released information that is later discovered to be inaccurate or misleading (*see* CPSC Brief at 27, CFA Brief at 14-15).[51] But as the Court of Appeals recognized (*see* Pet. App. 37a), the duty to "publish a retraction" is in no way incompatible with the FOIA and is what one would expect an agency to do, even if not obligated by law. Moreover, presumably a retraction will not often be necessary, since the manufacturer generally will have brought any problems in the information to the CPSC's attention within the notice and comment period provided by Section 6(b)(1) and prior to any FOIA disclosure.[52]

Finally, the CPSC conjures up some vast administrative burden that supposedly will be created by the decision below (*see* CPSC Brief at 13). This "burden" argument is distinctly reminiscent of the reaction of many administrators to the advent of the FOIA itself.[53] However, as the Attorney General has stated with respect to the FOIA,

51. CFA's reliance on the use of the term "publish" to indicate something more than release to an FOIA requester (*see* CFA Brief at 15) ignores the facts that the term may be used interchangeably with the term "disclose" and includes the concept of imparting knowledge "to one or more persons." *See* Webster's Third New International Dictionary (unabridged ed. 1963) 1837 & Explanatory Notes, at 20a. Similarly, the House Report's listing of several ways in which the retraction might be published (H. R. Rep. No. 1153, 92d Cong., 2d Sess. 32 (1972)) is of no avail to the CPSC (*see* CPSC Brief at 36) because there is no suggestion that the list is all-inclusive.

52. The argument that a retraction is necessary only where the disclosure was made "in administration of" the CPSA (*see* CPSC Brief at 27 n. 11) is without merit. If, as we demonstrate elsewhere, the Section 6(b)(1) procedures are applicable to FOIA requests, then compliance with such requests obviously requires action by the CPSC in the administration of the CPSA.

53. *See, e.g.*, Federal Public Records Law (Part I): Hearings on H. R. 5012 *et al.* Before a Subcomm. of the House Comm. on

"burden is no excuse for intentionally disregarding or slighting the requirements of the law, and where necessary, additional resources should be sought or provided to achieve full compliance." [54]

Moreover, any "burden" that may be imposed on the CPSC by Section 6(b)(1) is no more significant than what is otherwise necessary. Compliance with the FOIA by any agency requires more than location and production of documents. Information must be reviewed against disclosure limitations such as those of the Trade Secrets Act, 18 U. S. C. § 1905,[55] and Exemption 4 of the FOIA, 5 U. S. C. § 552(b)(4).[56] Additionally, the CPSC's own regulations require it to withhold information exempt from mandatory disclosure under the FOIA pursuant to 5 U. S. C. § 552(b) whenever the agency "determines that disclosure is contrary to the public interest." 16 C. F. R. § 1015.15(b). These statutes and regulations, like Section

53. (Cont'd)
Government Operations, 89th Cong., 1st Sess. 48, 56, 61 (1965) (statement of Fred B. Smith, Acting General Counsel, Treasury Department) ("there would be a tremendous additional burden placed on the Government, and we would have to hire a lot of people to handle these requests"); *accord, id.* at 218 (letter from Acting General Counsel of the Department of Defense); *id.* at 223 (letter from W. Willard Wirtz, Secretary of Labor); *id.* at 263 (letter from W. J. Driver, Administrator, Veterans Administration).

54. Attorney General's 1974 FOIA Amendments Memorandum to Executive Departments, at 13 (1975).

55. *See* **Chrysler Corp. v. Brown,** 441 U. S. 281, 318 (1979). In the CPSC's case, Section 6(a)(2) of the CPSA, 15 U. S. C. § 2055(a)(2), must also be considered and would not allow for release of trade secrets or other protected information even pursuant to quasi-legislative regulations, as does the Trade Secrets Act.

56. In determining whether information comes within Exemption 4, agencies consider such questions as whether disclosure would "impair the Government's ability to obtain necessary information in the future" or "cause substantial harm to the competitive position of the person from whom the information was obtained." **National Parks & Conservation Ass'n v. Morton,** 498 F. 2d 765, 770 (D. C. Cir. 1974). The resolution of these questions is not always easy and may be quite time-consuming.

6(b)(1), may complicate disclosure, require deletion of some material before production of the balance, or, indeed, make disclosure impossible altogether. But they may not be ignored merely because they impose some limitation on the agency's ability to disclose information in a wholesale fashion.

In any event, it has not been established that compliance with Section 6(b)(1) before releasing information to an FOIA requester would create any undue "burden." The CPSC asserts that it receives nearly 8,000 FOIA requests annually, the vast majority of which "presumably" seek information from which a manufacturer's identity could be readily ascertained (CPSC Brief at 30-31). There appears to be no basis for this "presumption," and neither of these assertions finds any evidence in the record. The fact is that simple deletion of a manufacturer's identity to ease whatever burden is imposed by Section 6(b)(1) may often also satisfy the requester. There may be additional ways in which the objectives of both Section 6(b)(1) and the FOIA can be accommodated.[57]

57. For example, the CPSC states that it receives approximately 10,000 consumer complaints each year and that the accuracy and fairness of these complaints "can rarely be determined" from the documents themselves (CPSC Brief at 31; *see also* CFA Brief at 22-23 n. 22). Of course, not all of these complaints would be responsive to a typical FOIA request and some might be protected by an exemption if the agency chose to invoke it. *See* Attorney General's 1974 FOIA Amendments Memorandum to Executive Departments, at 6 (1975) (suggesting that information may come within Exemption 7, 5 U. S. C. § 552(b)(7), even when not generated through the agency's "initiative"). Indeed, many consumer complaints may not even identify a specific manufacturer and thus would pose no Section 6(b)(1) problem.

Moreover, the CPSC presumably routinely investigates most consumer complaints or discusses them with the manufacturers involved, since this is part of the agency's function. *See, e.g.,* 15 U. S. C. §§ 2054(a), 2055(c). And where FOIA requests are made for as yet unreviewed complaints, the CPSC's communication

Despite past suggestions by the Attorney General that agencies establish guidelines to aid them in complying with the FOIA,[58] the CPSC has made no effort to achieve the accommodation between Section 6(b)(1) and the FOIA that is necessary here, either by promulgating substantive regulations or by developing internal operating procedures. That being the case, it is difficult to comprehend how the CPSC can be so certain that the applicability of Section 6(b)(1) to FOIA requests will create any excessive burden. Indeed, the mere handful of objections to disclosure received by this agency in the past effectively demonstrates how overstated is the burden claim now being made.[59]

We have little doubt that the CPSC's declared policy of discretionary disclosure under the FOIA whenever pos-

57. (Cont'd)
with the identified manufacturer under Section 6(b)(1) and the resulting comments normally will provide sufficient basis for satisfying the provision.

58. *See, e.g.*, Attorney General's 1974 FOIA Amendments Memorandum to Executive Departments, at 12 (1975).

59. Normally there should be little effort required to satisfy a manufacturer's concern as to the propriety of a disclosure under Section 6(b)(1). In response to an FOIA request recently made by counsel for one of the manufacturers, the CPSC has stated both that it receives 8,000 FOIA requests each year, and that it received only twelve objections to the release of documents in the first ten and one-half months of 1979. Only two of these objections were based on Section 6(b)(1). The CPSC believes that only five objections were received in 1978 (two of which raised Section 6(b)(1)) and only three in 1977 (one of which raised Section 6(b)(1)).

Additionally, there appear to be only four reported cases involving the CPSC and the FOIA in the eight years that the agency has been in existence. Two of these cases arose from the information involved in this case, and the third, **Pierce & Stevens Chem. Corp. v. CPSC,** 585 F. 2d 1382 (2d Cir. 1978), is the decision cited by the CPSC in support of its position. These three cases were all filed in 1975. The fourth case, **International Harvester Co. v. CPSC,** No. 79 C 1185 (N. D. Ill.), was filed in 1979. *See* CPSC 1979 Annual Report, Appendix I, at 111.

sible and without regard to such provisions as Exemptions 5 and 7, 5 U. S. C. §§ 552(b)(5) and (7), increases the quantity of records that may be susceptible to production. But the CPSC can hardly complain about a burden that it has largely created.[60] In short, like any other minor inconsistencies that may exist between Section 6(b)(1) and the FOIA, the alleged burden created by the decision below simply is not sufficient to justify a finding of some insoluble conflict between the statutes.

C. Exemption 3 of the FOIA Permits the CPSC To Withhold Information That May Not Be Disclosed Under Section 6(b)(1).

The CPSC's brief completely ignores the significant holding of both courts below (*see* Pet. App. 66a-67a, 94a) that Section 6(b)(1) is a withholding statute within the meaning of Exemption 3 of the FOIA, 5 U. S. C. § 552(b)(3),[61] and thus that the FOIA does not require

60. Moreover, the number of instances in which the CPSC must apply the criteria of Section 6(b)(1) to documents requested under FOIA should be reduced to the extent that the CPSC receives requests for documents that are not "agency records" and hence not subject to the requirements of the FOIA. 5 U. S. C. §§ 552(a)(3), (4)(B); *see* **Kissinger v. Reporters Comm. for Freedom of the Press,** — U. S. —, —, 48 U. S. L. W. 4223, 4227 (1980); **Ryan v. Department of Justice,** — F. 2d —, — (D. C. Cir. Jan. 7, 1980) (No. 79-1777) (slip opin. at 6); *see also, e.g.*, **Goland v. CIA,** 607 F. 2d 339, 346-47 (D. C. Cir. 1978), *petition for cert. filed,* 48 U. S. L. W. 3005 (July 10, 1979) (No. 78-1924); **Warth v. Department of Justice,** 595 F. 2d 521, 523 n. 7 (9th Cir. 1979); **Committee on Masonic Homes v. NLRB,** 556 F. 2d 214, 218 n. 4 (3d Cir. 1977). Indeed, it may be that documents (like those involved here) that an agency obtains from private parties by compulsory processes normally are not "agency records" for FOIA purposes. *See* **FTC v. Anderson,** — F. 2d —, —, 1979-2 CCH Trade Cas. ¶ 62,837, at 78,827, 78,828 (D. C. Cir. Sept. 17, 1979).

61. Exemption 3 excludes from mandatory disclosure pursuant to the FOIA those matters that are:

> "specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion

the CPSC to disclose documents as to which it has not complied with Section 6(b)(1).[62] The CPSC argued in the Court of Appeals (*see* Pet. App. 63a), and presumably still maintains, that Section 6(b)(1) cannot be an Exemption 3 statute because it was not intended to apply to FOIA requests. Of course, in the words of the Court of Appeals, the contrary reading of Congressional intent demonstrated by the language and legislative history of Section 6(b)(1) (*see* pp. 22-35, *supra*) "disposes of [this] argument" (Pet. App. 63a). However, because CFA devotes a substantial portion of its argument to the Exemption 3 question (*see* CFA Brief at 20-29), we will briefly demonstrate the errors in its position.

The current language of Exemption 3 was enacted in 1976[63] and was intended to overrule this Court's decision in **FAA Administrator v. Robertson,** 422 U. S. 255 (1975).[64] As noted by the Court of Appeals (*see* Pet. App. 65a), the amendment was designed to exclude from Exemption 3 those statutes that invested agencies with very broad dis-

61. (Cont'd)

on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld."

Prior to 1976 the statute did not contain the proviso. *See* Pub. L. No. 90-23, 81 Stat. 54 (1967).

62. Incredibly, the CPSC states that "[t]he lower courts in the present case have not yet decided whether the accident reports submitted by respondents fall within one or more of the FOIA's exemptions from mandatory disclosure" (CPSC Brief at 22 n. 7). This is completely incorrect as to Exemption 3.

63. Pub. L. No. 94-409, 90 Stat. 1247 (1976).

64. H. R. Rep. No. 1441, 94th Cong. 2d Sess. 25, *reprinted in* [1976] U. S. Code Cong. & Ad. News 2244, 2261.

The District Court's preliminary injunction opinion in this case was issued prior to the 1976 amendment to Exemption 3 and was based in part on the **Robertson** decision (*see* A. 115-16). On reconsideration Judge Latchum reaffirmed his holding that Section 6(b)(1) qualified as an Exemption 3 statute (*see* Pet. App. 87a). It is this holding that was affirmed by the Court of Appeals (*see* Pet. App. 66a-67a).

cretion or "*carte blanche* to withhold any information [they] please[d]."[65] *See* **Chamberlain v. Kurtz,** 589 F. 2d 827, 839 (5th Cir.), *cert. denied,* — U. S. —, 100 S. Ct. 82 (1979). This, of course, is not true of Section 6(b)(1), which provides "detailed requirements and limitations relating to the Commission's authority to disclose information."[66]

CFA is simply wrong in contending that Section 6(b)(1) cannot come within Exemption 3 because it does not exempt but rather "authorizes" disclosure (CFA Brief at 23). Section 6(b)(1) makes clear that inaccurate or misleading information identifying particular manufacturers may not be released; the CPSC's sole options are to comply with Section 6(b)(1) or to withhold the information from the public. The fact that the specific word "withhold" does not appear in Section 6(b)(1) in no way detracts from this conclusion.[67]

Further, it is not true that Section 6(b)(1) fails to establish standards to be applied in determining whether information should be withheld (*see* CFA Brief at 24). There are three such standards clearly delineated in the statute. The CPSC must "take reasonable steps to assure" (1) that the information is "accurate," (2) that disclosure will be "fair in the circumstances," and (3) that disclosure will be "reasonably related to effectuating the purposes of [the CPSA]."

65. H. R. Rep. No. 880 (Part I), 94th Cong., 2d Sess. 23, *reprinted in* [1976] U. S. Code Cong. & Ad. News 2183, 2205.

66. H. R. Rep. No. 1153, 92d Cong., 2d Sess. 31 (1972).

67. For example, in **Seymour v. Barabba,** 559 F. 2d 806, 808 (D. C. Cir. 1977), 13 U. S. C. § 9 was held to come within Exemption 3 even though it does not refer to "withholding" or "disclosing" but merely provides that census information is to be used only for the statistical purposes for which it was supplied.

Even CFA does not appear to challenge the specificity of the first standard, *i.e.*, that the information be "accurate." Instead, CFA argues that the requirement that the CPSC "take reasonable steps to assure" that the three standards for disclosure are met "infects each of [them] with the imprecision the 1976 amendment sought to eliminate" (CFA Brief at 26-27). To the contrary, juries and courts have long been entrusted with the task of determining what is "reasonable" behavior and have been successful in doing so.

CFA then asserts that the third standard—whether the information is "reasonably related to effectuating the purposes" of the CPSA—is "nearly beyond measure" (CFA Brief at 27). If this statement were true, however, the CPSC could never comply with Section 6(b)(1) even with respect to so-called "affirmative" disclosures. The fact is that a rational determination whether disclosure is "reasonably related to effectuating the purposes" of the CPSA can easily be made by comparing those purposes (enumerated in 15 U. S. C. § 2055(b)) with the purpose that would be served by disclosure of the information in question (*see* A. 121).[68]

Section 6(b)(1) thus stands in stark contrast to the nebulous withholding provisions that were noted by the Conference Committee as not coming within the new

68. *See, e.g.*, **Lee Pharmaceuticals v. Kreps,** 577 F. 2d 610 (9th Cir. 1978), *cert. denied,* 439 U. S. 1073 (1979) (cited in CFA Brief at 28), where a provision requiring that patent application information be kept in confidence "unless necessary to carry out the provisions of any Act of Congress or in such special circumstances as may be determined" (35 U. S. C. § 122) was found to be an Exemption 3 statute.

Determining whether a particular disclosure would be "fair in the circumstances" should pose no greater problem (*see* A. 120).

language of Exemption 3.[69] Section 6(b)(1) is far more like Section 142(a) of the Atomic Energy Act of 1954, 42 U. S. C. § 2162(a), which directs that information be released only if it "can be published without undue risk to the common defense and security" and was explicitly acknowledged as satisfying the new language of Exemption 3.[70] As described in **American Jewish Congress v. Kreps,** 574 F. 2d 624, 629 (D. C. Cir. 1978), this statute and other examples given in the legislative history "imply a congressional sense that the crucial distinction lay between statutes that in some manner *told* the official what to do about disclosure and those that did not significantly inform his discretion in that regard" (footnote omitted) (emphasis in original).

69. *See* H. R. Rep. No. 1441, 94th Cong., 2d Sess. 24-25, *reprinted in* [1976] U. S. Code Cong. & Ad. News 2244, 2260-61.

Unlike the statute before the Court here, section 1104 of the Federal Aviation Act, 49 U. S. C. § 1504, permits the withholding of information if its release "would adversely affect the interests of [a] person and is not required in the interest of the public." Section 1106 of the Social Security Act, 42 U. S. C. § 1306, similarly prohibits disclosure of a wide range of Social Security information except as the Secretary of HEW or the Secretary of Labor "may by regulations prescribe."

The statute that was involved in **Mobil Oil Corp. v. FTC,** 406 F. Supp. 305 (S. D. N. Y. 1976) (cited in CFA Brief at 23), allows the agency almost unlimited discretion to disclose any information it has obtained "as it shall deem expedient in the public interest." 15 U. S. C. § 46(f). Like the statutes cited in the amendment's legislative history, this provision in the words of the District Court, "vests virtually 'unfettered and unguided power' in the [agency] to determine what information to disclose" (Pet. App. 91a n. 22, *quoting* **Stretch v. Weinberger,** 495 F. 2d 639, 640 (3d Cir. 1974)).

70. *See* H. R. Rep. No. 880 (Part I), 94th Cong., 2d Sess. 23, *reprinted in* [1976] U. S. Code Cong. & Ad. News 2183, 2205.

Similarly, the statute found to satisfy Exemption 3 in **Chamberlain v. Kurtz,** 589 F. 2d 827 (5th Cir.), *cert. denied,* — U. S. —, 100 S. Ct. 82 (1979), permits the Secretary of the Treasury to withhold information whose disclosure will "seriously impair Federal tax administration." 26 U. S. C. §§ 6103(c), (e)(6).

Section 6(b)(1) very clearly tells the CPSC "what to do" about disclosure of information that identifies a manufacturer, and it makes no distinction between disclosures in response to FOIA requests and disclosures "initiated" by the agency. In either case, the agency must take reasonable steps to assure that the information is accurate and that release will be fair in the circumstances and reasonably related to the purposes of the CPSA. As stated by the Court of Appeals, "[t]he standards . . . are sufficiently definite that they provide a reviewing Court with criteria to measure the Commission's compliance with Congress's intent" (Pet. App. 67a).[71]

In **American Jewish Congress v. Kreps,** *supra,* the court ruled that a non-disclosure statute comes within Exemption 3 if it "is the product of Congressional appreciation of the dangers inherent in airing particular data and incorporates a formula whereby the administrator may determine precisely whether disclosure in any instance would pose the hazard that Congress foresaw." 574 F. 2d at 628-29. Not only does Section 6(b)(1) provide the "formula," but here, of course, as noted by the Court of Appeals (*see* Pet. App. 65a), disclosure of the information to the requesters would indeed "pose the hazard" that led Congress to enact Section 6(b)(1) (*see* pp. 28-35, *supra*). For both these reasons, the provision comes within Exemption 3 and the information therefore need not be disclosed.

71. The District Court also noted that "susceptib[ility]" of the standards to "effective judicial review" (Pet. App. 90a). The only commentator who appears to have addressed the issue has concluded that Section 6(b)(1) satisfies the Exemption 3 requirements on similar grounds. *See* Note, **The Effect of the 1976 Amendment to Exemption Three of the Freedom of Information Act,** 76 Colum. L. Rev. 1029, 1045 & n. 100 (1976).

V.

The CPSC's Litigation-Inspired "Administrative Interpretation" of Section 6(b)(1) Should Be Given No Weight and Is Not Supported by the Subsequent Legislative History Cited by the Agency.

Having failed to support its position in the language or contemporaneous legislative history of Section 6(b)(1) or to demonstrate that there is any insoluble conflict between Section 6(b)(1) and the FOIA, the CPSC makes two other arguments for reversal of the decisions below. First, it contends that this Court should defer to its "long-standing interpretation" that the provision applies only to disclosures "initiated" by the agency (CPSC Brief at 40). Second, it asserts that "later legislative events confirm the view that the procedural requirements of Section 6(b)(1) are inapposite in the FOIA setting" and that "when Congress revisited and amended the statute, it . . . embraced the agency's position" (CPSC Brief at 14, 15; *see also* CFA Brief at 18-20). These two arguments are utterly devoid of merit.

A. The CPSC's Belated and Self-Serving "Interpretation" of Section 6(b)(1) Is Not Entitled to Any Weight.

The CPSC asserts that it "has consistently construed Section 6(b)(1) to apply only to agency-generated disseminations of product safety information and not to FOIA disclosures"; that "[t]his view is formalized in proposed Commission regulations"; and that "[a]n agency's interpretation of its own enabling legislation should not be overturned unless there are 'compelling indications' that the interpretation is wrong" (CPSC Brief at 40). Aside from the fact that the courts below correctly found "compelling indications" in logic and in the language and his-

tory of Section 6(b)(1) that Congress did not intend the provision to apply only to disclosures that the CPSC "initiates," the truth of the matter is that the CPSC has no "longstanding interpretation" of the provision.

The CPSC did not reach its strained reading of Section 6(b)(1) until it met in executive session on October 6, 1975 (A. 169-70)—over six months *after* it had decided to release the information involved in this case and more than two months *after* the manufacturers' preliminary injunction motions had been fully briefed and argued before the District Court. Further, it was not until October 5, 1977—two days before the CPSC filed its brief opposing the manufacturers' motions for summary judgment (A. 7) and two years after the District Court ruled that disclosure of the "TV-related accident" information would violate Section 6(b)(1) (A. 114-21)—that the CPSC's proposed rules were published. *See* 42 Fed. Reg. 54,304 (1977).[72]

Not surprisingly, when the CPSC's "administrative interpretation" was presented to Judge Latchum in October of 1977, he refused to accord any significant weight to it, noting that it "did not arise until after the present controversy began" (Pet. App. 81a). This refusal was completely correct. As this Court stated over thirty years ago, the deference to be given an interpretative rule depends upon "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." **Skidmore**

72. Aside from an extension of the time period for filing comments (*see* 42 Fed. Reg. 60,752 (1977)), the CPSC has published nothing with respect to the proposed rules since October 5, 1977, the date they initially appeared in the Federal Register.

v. Swift & Co., 323 U. S. 134, 140 (1944).[73] The CPSC's "interpretation" of Section 6(b)(1) is no more than a litigation tactic and clearly fails the **Skidmore** test, which remains the standard by which interpretative rules are measured. *See, e.g.*, **SEC v. Sloan**, 436 U. S. 103, 117-18 (1978); **Adamo Wrecking Co. v. United States**, 434 U. S. 275, 287 n. 5 (1978); **Batterton v. Francis**, 432 U. S. 416, 425 n. 9 (1977).

In **Davies Warehouse Co. v. Bowles**, 321 U. S. 144, 156 (1944), this Court recognized that the formulation of a position for purposes of litigation is not the type of careful consideration by an administrative agency that is ordinarily given judicial deference:

> "The administrative ruling in this case was no sooner made than challenged. We cannot be certain how far it was determined by the considerations advanced, mistakenly as we think, in its defense of this case. It has hardly seasoned or broadened into a settled administrative practice."

See also **International Brotherhood of Teamsters v. Daniel**, 439 U. S. 551, 569 (1979). This case is even more compelling than **Davies**, since the CPSC's determination to disclose the information was challenged first, and the "longstanding" and "consistent" "interpretation" was adopted second.

73. The interpretation cannot be considered "substantive" as opposed to "interpretative" within the meaning of **Skidmore** because it was not promulgated pursuant to the exercise of delegated legislative power and in accordance with the procedures established by the APA. *See* **Chrysler Corp. v. Brown**, 441 U. S. 281, 301-02 (1979), and the Court of Appeals' discussion of this point (Pet. App. 31a-32a).

In addition to being litigation-inspired, the CPSC's October 5, 1975 "administrative interpretation" of Section 6(b)(1) is not supported by any opinion or statement of the agency explaining the reasons for its adoption. Moreover, even if the rationales for the CPSC's position that have been articulated by counsel in the context of this litigation had been voiced by the agency,[74] they would not be entitled to any special weight because they do not involve matters in which the agency has any expertise that would justify judicial deference. *See, e.g.*, **International Brotherhood of Teamsters v. Daniel,** 439 U. S. 551, 566 n. 20 (1979). The CPSC's "interpretation" of Section 6(b)(1) is based primarily on its desire to effectuate not the purposes of the CPSA, but rather what it perceives to be the purposes of the FOIA.[75] However, "[a]n agency interpretation involving, at least in part, the provisions of [an act of general application] does not carry the weight, in ascertaining the intent of Congress, that an interpretation by an agency 'charged with the responsibility' of administering a particular statute does." **United States v. Florida East Coast Ry.,** 410 U. S. 224, 236 n. 6 (1973); *see* **Alaska Steamship Co. v. United States,** 290 U. S. 256, 264 (1933); *see also* **IT&T v. International Brotherhood of Electrical Workers,** 419 U. S. 428, 441 (1975).

It is clear that this case does not involve an agency's long-standing contemporaneous construction of its own

74. Counsel's briefs cannot compensate for the lack of any reasoned opinion at the administrative level. **Investment Co. Inst. v. Camp,** 401 U. S. 617, 628 (1971).

75. This is evident from the arguments advanced by the CPSC in this litigation (*see, e.g.*, Transcript of Oral Argument in the Court of Appeals, at 5-7, 11-13) and also from the preface to the agency's proposed rules governing the applicability of Section 6(b)(1), which states that applying the provision to FOIA requests "would thwart the purposes of the FOIA." 42 Fed. Reg. 54,305 (1977).

enabling act. The interpretation came several years after enactment of the CPSA[76] and focuses not on the CPSA but rather on the FOIA. Additionally, as the District Court recognized, the applicability of Section 6(b)(1) to disclosures made in response to FOIA requests is "a narrow legal issue" to be resolved only once, and it is not the sort of issue as to which the agency can offer any peculiar expertise (Pet. App. 82a).

In any event, the CPSC may not, through the guise of adopting an "administrative interpretation" of Section 6(b)(1), obtain authority to disclose information that has been denied it by Congress. *See* **Southeastern Community College v. Davis,** — U. S. —, —, 99 S. Ct. 2361, 2369-70 (1979); **SEC v. Sloan,** 436 U. S. 103, 118 (1978).[77] Since the CPSC's "interpretation" of Section 6(b)(1) is contrary to "the clear meaning of [the] statute, as revealed by its language, purpose and history." (**International Brotherhood of Teamsters v. Daniel,** 439 U. S. 551, 566 n. 20 (1979)), it should be rejected.

76. *See, e.g.*, **Midway Co. v. Eaton,** 183 U. S. 602, 609 (1902) (administrative interpretation made three years after passage of the statute not "exactly contemporaneous"); **Brennan v. General Tel. Co.,** 488 F. 2d 157, 160 (5th Cir. 1973) (administrative interpretation made 29 months after passage of the statute not contemporaneous). In contrast, the cases cited by the CPSC (*see* CPSC Brief at 40-41) involved statutes that had been in existence for a number of years and agency interpretations adopted within a year after the statute's enactment (**Zenith Radio Corp. v. United States,** 437 U. S. 443, 450 (1978)) or even before the statute's enactment (**NLRB v. Bell Aerospace Co.,** 416 U. S. 267, 275, 285 (1974); **Norwegian Nitrogen Prod. Co. v. United States,** 288 U. S. 294, 311-15 (1933)).

77. An agency's authority to issue interpretative rulings cannot be used as a means of expanding its substantive powers. **Federal Maritime Comm'n v. Seatrain Lines, Inc.,** 411 U. S. 726, 745 (1973); *see also* **Dow Chem. Co. v. EPA,** 605 F. 2d 673, 682 (3d Cir. 1979).

B. Subsequent Legislative History and Amendments to Other Portions of the CPSA Do Not Demonstrate Congressional Approval of the CPSC's "Interpretation" of Section 6(b)(1).

The CPSC asserts that "[l]egislative developments subsequent to passage of the Act confirm that Congress did not intend Section 6(b)(1) to apply to disclosures other than those the Commission undertakes as part of its statutory responsibilities" (CPSC Brief at 37). Of course, subsequent legislative history is, as expressed by the Court of Appeals, "a hazardous basis for inferring the intent of an earlier one" (Pet. App. 55a, *quoting* **United States v. Price,** 361 U. S. 304, 313 (1960)). Certainly, such subsequent history "cannot substitute for a clear expression of legislative intent at the time of enactment." **Southeastern Community College v. Davis,** — U. S. —, —, 99 S. Ct. 2361, 2370 n. 11 (1979). Moreover, it can only be entitled to consideration when it "represents the will of Congress as a whole" and "constitute[s] subsequent 'legislation' such as this Court might weigh in construing the meaning of an earlier enactment." *Id.; accord,* **Illinois Brick Co. v. Illinois,** 431 U. S. 720, 733-34 n. 14 (1977).

Section 6 of the CPSA has *never* been amended and its intent has *never* been the subject of a later Congressional enactment. Indeed, Congress as a whole has not considered the provision since it was originally enacted. As recognized by the Court of Appeals, the isolated pieces of subsequent legislative history offered by the CPSC in support of its position do not demonstrate Congressional approval of the CPSC's "interpretation" of Section 6(b)(1).

1. The CPSC first relies upon a colloquy between Richard O. Simpson, then Chairman of the CPSC, and Representative John E. Moss during oversight hearings in 1976 (*see* CPSC Brief at 37-38). In this colloquy, Chairman Simpson mentioned the instant litigation and said that the CPSC interpreted Section 6(b)(1) of the CPSA to be inapplicable to FOIA requests; Representative Moss then responded, "As the primary author of both acts, I am inclined to agree with you." [78] In the words of the Court of Appeals, "notwithstanding Representative Moss' claimed authorship of the CPSA, it should be recognized that he was not a sponsor of the bill that provided that legislation with its provisions governing information disclosure" (Pet. App. 58a). Indeed, the less restrictive disclosure provisions favored by Representative Moss were rejected by the House Committee in favor of those that were eventually enacted in Section 6(b)(1) (*see* p. 33 n. 39, *supra*).

Moreover, as the Court of Appeals also recognized, "[i]t goes without saying that the views of a single member of Congress concerning the appropriate interpretation of a statutory provision passed some years ago earlier are not dispositive" (Pet. App. 58a). Such isolated *post hoc* observations are generally given little, if any, weight in statutory construction. *E.g.,* **Quern v. Mandley,** 436 U. S. 725, 736 n. 10 (1978); **City of Los Angeles Department of Water & Power v. Manhart,** 435 U. S. 702, 714 (1978); **United States v. Philadelphia National Bank,** 374 U. S. 321, 348-49 (1963); **United States v. UMW,** 330 U. S. 258, 282 (1947).[79]

78. Oversight Hearings, *supra* p. 17 n. 12, at 7-8.

To be "inclined to agree" is hardly a clear expression even of a single Congressman's view.

79. The isolated post-enactment statement of a Congressman who favored a provision other than the one that was enacted is a far cry from remarks made during Congressional debates by the sponsors of proposed amendments that later became law such as

The expressed views of individual members of Congress are especially non-persuasive when they are made in the absence of accompanying legislation and are not brought to the attention of Congress as a whole for approval or rejection. *See, e.g.*, **Regional Rail Reorganization Act Cases,** 419 U. S. 102, 132 (1974); **United States v. Wise,** 370 U. S. 405, 411 (1962). Indeed, in **Wise** the interpretation that was rejected was expressed by Congressmen who unsuccessfully proposed legislation intended to correct their erroneous reading of the prior statute. This is factually quite close to the present case, where Chairman Simpson informed Representative Moss of this litigation and requested Congress to clarify the language that Judge Latchum had allegedly misconstrued. In response to a request from Representative Moss, a proposed amendment was submitted by Chairman Simpson but was never even reported out of committee, a fact that both courts below correctly considered significant (*see* Pet. App. 58a, 81a n. 9).[80] *See* **NLRB v. Robbins Tire & Rubber Co.,** 437 U. S. 214, 230 n. 11, 234 (1978). Obviously, the failure to report out the amendment should be given far more weight than a single Congressman's offhand remarks.

79. (Cont'd)
were involved in the cases cited by the CPSC (*see* CPSC Brief at 38-39 n. 18). *See, e.g.*, **Chrysler Corp. v. Brown,** 441 U. S. 281, 311 (1979); **Simpson v. United States,** 435 U. S. 6, 13 (1978); **Schwegmann Bros. v. Calvert Distillers Corp.,** 341 U. S. 384, 394-95 (1951).

80. This scenario is completely different from those presented in the cases cited by the CPSC (*see* CPSC Brief at 38), where the legislation proposed by the agency was favorably reported by both Houses but not enacted prior to adjournment (**Wong Yang Sung v. McGrath,** 339 U. S. 33, 47 (1950)) and where industry specifically requested that Congress withhold legislative action pending an administrative resolution of the problem (**American Trucking Ass'n v. Atchison, Topeka & Santa Fe Ry.,** 387 U. S. 397, 417 (1967)). Even in these cases this Court indicated that there was no basis for finding later Congressional approval of the agency's position. Yet that is precisely what the CPSC argues should be inferred here.

2. Both the CPSC and CFA (*see* CPSC Brief at 38-42, CFA Brief at 18-20) also contend that the legislative history of the Consumer Product Safety Commission Improvements Act of 1976 ("CPSCIA")[81] evidences Congressional approval for the CPSC's interpretation of Section 6(b)(1) to exclude responses to FOIA requests. This is clearly incorrect.

Among other things, the CPSCIA added subsection (e) to Section 29 of the CPSA. Section 29(e) authorizes the CPSC to make accident reports that it has generated available to other federal and state agencies but prohibits release of the reports by those other agencies "unless . . . the Commission has complied with the applicable requirements of [Section 6(b)]." 15 U. S. C. § 2078(e). This provision actually cuts against, not in favor of, the CPSC's position in this litigation, since it reemphasizes the importance that Congress attached to the disclosure limitations of Section 6(b)(1) and the need to assure that the protections of that provision would not be lost through a transfer of information to another agency.

Apparently recognizing that the language of Section 29(e) is not helpful to them, the CPSC and CFA point to the following statement in the Conference Report on the CPSCIA:

> "The requirement that the Commission comply with section 6(b) prior to another Federal agency's public disclosure of information obtained under the Act is not intended by the conferees to supersede or conflict with the requirements of the Freedom of Information Act (5 U. S. C. 552(a)(3) and (a)(6)). The former relates to public disclosure initiated by the Federal

81. Pub. L. No. 94-284, 90 Stat. 510 (1976).

> agency while the latter relates to disclosure initiated by a specific request from a member of the public under the Freedom of Information Act." [82]

Neither court below found this statement to be persuasive evidence of approval of the CPSC's "interpretation" of Section 6(b)(1) by even the CPSCIA Conference Committee, let alone by the 1976 Congress as a whole (*see* Pet. App. 56a, 84a). Indeed, the District Court reasoned that, by referring to the specific provisions of the FOIA establishing the time frame for responding to FOIA requests (*see* pp. 38-39, *supra*), the Conference Committee was merely noting "the need for some sort of accommodation between the different time restraints imposed by Section 6(b) and the FOIA" (Pet. App. 84a).[83]

Moreover, as the Court of Appeals correctly noted (*see* Pet. App. 55a), the question whether Section 6(b)(1) applies to disclosures made in response to FOIA requests is not addressed in the Report of the House Committee that drafted the CPSCIA,[84] or in the debates on either the House Report or the Conference Report.[85] Nor was the

82. H. R. Rep. No. 1022, 94th Cong., 2d Sess. 27, *reprinted in* [1976] U. S. Code Cong. & Ad. News 1017, 1029.

83. The District Court also emphasized that "[n]otably, the statement does not make Section 6(b) altogether inapplicable in the face of an FOIA request, as the Commission would do" (Pet. App. 84a). Similarly, the Court of Appeals noted that the language of the Conference Committee was inconsistent with the fact that "section 25(c) of the CPSA, by its terms, applies the requirements of section 6(b)(1) to FOIA requests for accident investigation reports" (Pet. App. 57a).

84. H. R. Rep. No. 325, 94th Cong., 1st Sess. 18 (1975).

85. *See* 121 Cong. Rec. 33,691 (1976) (House approval of the House Report); 122 Cong. Rec. 10,811 (1976) (House approval of the Conference Report); *id.* at 11,586 (Senate approval of the Conference Report).

question treated in Section 29(e) itself, which was described by Chairman Simpson as "a minor thing to allow the Commission to cooperate with the states" and was to be given "a narrow interpretation." [86] The Court of Appeals thus concluded:

> "Given our view that the legislative history of section 6(b)(1) itself strongly supports an inference that the Commission's interpretation of that provision conflicts with the intent of the Congress that enacted it, we are unwilling to accept the isolated, and in our view erroneous, conclusion of a later congressional committee as persuasive authority to the contrary" (Pet. App. 56a).

This conclusion is clearly correct. Even the cases cited by CFA (*see* CFA Brief at 19) stand for the proposition that the only subsequent legislative development that may be given substantial weight is the Congressional adoption of "specific statutory language that was thought to clarify the meaning of an earlier statute." **Illinois Brick Co. v. Illinois**, 431 U. S. 720, 734 n. 14 (1977).[87] The CPSC asserts that "[b]y incorporating Section 6(b) by reference into Section 29(e) . . . Congress necessarily

86. Consumer Product Safety Act Amendments: Hearings on H. R. 5361, H. R. 5601, *et al.* Before the Subcomm. on Consumer Protection & Finance of the House Comm. on Interstate & Foreign Commerce, 94th Cong., 1st Sess. 180 (1975).

87. The leading cases in this area are **Red Lion Broadcasting Co. v. FCC**, 395 U. S. 367, 381 (1969), and **Federal Hous. Admin. v. Darlington, Inc.**, 358 U. S. 84, 90 (1958). The statutes involved in those cases were explicitly interpretative of earlier legislation *See* 47 U. S. C. § 315(a); 12 U. S. C. § 1731b(a). Similarly, the statute involved in **Mount Sinai Hosp., Inc. v. Weinberger**, 517 F. 2d 329, 343 (5th Cir. 1975), *cert. denied*, 425 U. S. 935 (1976), was found to be necessarily interpretative since otherwise it would have been "pointless and ineffectual." *See also* **Glidden Co. v. Zdanok**, 370 U. S. 530, 541 (1962).

'interpret[ed] the scope of section 6(b)'" (CPSC Brief at 42 n. 20). That is not so. In contrast to interpretative legislation, Section 29(e) merely refers to Section 6(b) in declaring its applicability in a new area. In no way does it set forth the intent of Congress in enacting the earlier provision. As in **Illinois Brick**, the statement in the Conference Report in 1976 cannot control over the indications of Congressional intent in enacting Section 6(b)(1) in 1972.

3. The CPSC also contends that since Congress "has revisited the Act and left the [agency] practice untouched," it must be viewed as having approved that practice (CPSC Brief at 41, *quoting* **Saxbe v. Bustos,** 419 U. S. 65, 74 (1974)). However, the very cases cited to support this proposition make clear that the inference of Congressional approval is not automatic but depends on whether the interpretation "plainly has not escaped public or legislative notice," **United States v. Rutherford,** — U. S. —, —, 99 S. Ct. 2470, 2476 n. 10 (1979), and on such other factors as the length of time that the agency has followed the construction and the extent to which the overall statutory scheme has been amended. *See* **Andrus v. Allard,** — U. S. —, —, 100 S. Ct. 318, 322-23 (1979); **Board of Governors v. First Lincolnwood Corp.,** 439 U. S. 234, 247-48 nn. 12-13 (1978); **Saxbe v. Bustos,** 419 U. S. 65, 74 (1974). The CPSC's "administrative interpretation" of Section 6(b)(1) is hardly long-standing or even well-known.[88] Thus, the addition on one occasion of unrelated

88. There clearly was no "considerable public controversy" about the issue of Section 6(b)(1)'s applicability to FOIA requests in 1976 even remotely comparable to what was involved in **Rutherford.** Indeed, the CPSC's interpretation of the provision was not made public until *after* the enactment of the CPSCIA and still has not been finalized or placed in the Code of Federal Regulations. *See* p. 52 n. 72 *supra.*

amendments to the overall scheme of the CPSA cannot establish Congressional approval of that interpretation.

More importantly, however, if Congressional knowledge of the CPSC's interpretation of Section 6(b)(1) in 1976 is to be presumed, then it also must be presumed that Congress had knowledge of Judge Latchum's preliminary injunction opinion (issued October 23, 1975), in which that interpretation was emphatically rejected (*see* A. 115-16).[89] Indeed, "judicial" as well as "administrative" interpretations are discussed in **Rutherford.** — U. S. at —, 99 S. Ct. at 2476 n. 10; *accord,* **Lorillard v. Pons,** 434 U. S. 575, 580-81 (1978).

At any event, it is clear that the situation presented by this case offers far less reason to find Congressional adoption of an administrative interpretation than the facts this Court found insufficient in **SEC v. Sloan,** 436 U. S. 103 (1978). In **Sloan,** a Congressional Committee had recognized and explicitly approved the SEC's prior administrative construction of a provision of the Securities Act of 1934 in the course, thirty years later, of reenacting the provision and expanding its application to a new sphere. The Court held that it would not presume "general congressional awareness of the Commission's construction based upon only a few isolated statements in the thousands of pages of legislative documents." *Id.* at 120-21. These words are equally applicable here. The CPSC has not demonstrated any widespread Congressional knowledge of the CPSC's "administrative interpre-

89. This is particularly necessary in light of the fact that the Subcommittee ignored the CPSC's proposed amendment seeking to overrule the District Court's preliminary injunction holding through the insertion of an express exemption from Section 6(b)(1) for responses to FOIA requests (*see* p. 58 *supra*).

tation" of Section 6(b)(1) nor the existence of interpretative legislation declaring the intent of the 1972 Congress in enacting the provision. Thus, the argument that the Conference Report requires this Court to defer to the CPSC's interpretation of Section 6(b)(1), should, like the other arguments advanced by the CPSC, be categorically rejected.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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